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Attorney for Defendant
CALIFORNIA LAND TITLE OF MARIN

FILED

JUN 20 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

PATRICIA C. BARBERA,
Plaintiff,

vs.

WMC MORTGAGE CORPORATION, a
California corporation, et al., aka
WMC Direct; a California Business Entity;
GE Consumer Finance, a unit of General
Electric Company; Select Portfolio
Servicing Corp, a Utah Corporation;
Fairbanks Holding Corporation, a
Delaware Corporation; And Land Title
Company of Marin, a California Business
Entity; Does 1 thru 100, inclusive,

Defendants.

Case No.: Case No. 4:08-cv-02677-SBA
(prior related case number
3:08-cv-2677-PJH)

NOTICE REGARDING EXHIBIT
ATTACHMENT TO REQUEST FOR
JUDICIAL NOTICE BY DEFENDANT
CALIFORNIA LAND TITLE OF MARIN
IN SUPPORT OF MOTION TO DISMISS
PLAINTIFF PATRICIA C. BARBERA'S
COMPLAINT

Date: July 29, 2008
Time: 1:00 p.m.
Court: Hon. Sandra B. Armstrong

The following Exhibits, which are attachments to the Request for Judicial Notice is in
paper form only and is being maintained in the case file in the Clerk's Office.

A On July 23, 2004, plaintiff filed a complaint in the Superior Court of
California, County of San Francisco. One of the defendants was CAL
LAND.

1 B On September 3, 2004, WMC Mortgage Corp., WMC Finance Co.,
2 Apollo Management L.P., WMCDirect, and GE Consumer Finance
3 removed the San Francisco Superior Court action to the Northern
District of California, San Francisco Division.

4 C. On March 15, 2005, plaintiff filed a First Amended Complaint.

5 D. On April 26, 2005, California Land Title of Marin filed an Opposition
6 to Plaintiff's Motion to File a Second Amended Complaint.

7 E. On May 26, 2005, the Honorable Judge Sandra Brown Armstrong of
8 the Northern District of California, San Francisco Division, made an
9 order regarding the motion to file a second amended complaint and
10 struck those portions of the first amended complaint that added
allegations against California Land Title of Marin and ordered Plaintiff
to file a second amended complaint that removed the stricken
allegations.

11 F. On January 19, 2006, the Honorable Judge Sandra Brown Armstrong
12 of the Northern District of California, San Francisco Division,
13 dismissed, with prejudice, all of Plaintiff's federal causes of action
against WMC Mortgage.

14
15 The reason for manual filing is the voluminous nature of the Exhibits and the Exhibits
16 are available through PACER in Case No. C-04-3738 SBA.

17 Dated: June 19, 2008

18 /s/ Daniel A. Gamer

19 Daniel A. Gamer

20 Attorney for Defendant

21 California Land Title of Marin

22 I, Daniel A. Gamer, am the ECF User whose ID and password are being used to file
23 this Notice Regarding Exhibit Attachment by Defendant California Land Title of Marin.

24 /s/ Daniel A. Gamer

25 Daniel A. Game

EXHIBIT “A”

1 JOHN G. WARNER (CA State Bar No. 046123)
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3 Corte Madera, CA 94925
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5 Attorney for Plaintiff
6 Patricia C. Barbera

ENDORSED
FILED
San Francisco County Superior Court

JUL 23 2004

GORDON PARK-LI, Clerk
BY: JUN P. PANELO
Deputy Clerk

7 SUPERIOR COURT OF CALIFORNIA

8 COUNTY OF SAN FRANCISCO CASE MANAGEMENT CONFERENCE
9 UNLIMITED CIVIL DIVISION PLAN I DEC 23 2004 900

10 CLASS ACTION

DEPARTMENT 212

11 Patricia C. Barbera,

12 Plaintiff,

13 vs.

14
15 WMC Mortgage Corp., a
16 California Corporation; WMC
Finance Co.; Apollo Management
17 L.P.; WMC Direct; GE Consumer
Finance, a unit of General
18 Electric Company; Fairbanks
Capital Corp., a Utah
19 Corporation; Fairbanks Capital
Holding Corp., a Delaware
20 Corporation; California Land
Title Company of Marin, a
21 California business entity;
Does 1 through 100, inclusive,

22 Defendants.
23

Case No. 00004433269

COMPLAINT TO BAR PREDATORY
LENDING AND OTHER UNFAIR BUSINESS
PRACTICES; FOR REMEDIES UNDER
CALIFORNIA CONSUMERS LEGAL
REMEDIES ACT AND VARIOUS FEDERAL
HOME LOAN PROTECTION STATUTES;
MONETARY DAMAGES FOR FRAUD, FOR
BREACH OF CONTRACT, ELDER ABUSE,
AND USURY; AND FOR RESCISSION OF
HOME LOAN MORTGAGE

CLASS ACTION

Demand for Jury Trial

Type of Case:

Unfair Business Practice

24 INTRODUCTION

25 1. Plaintiff Patricia Barbera brings this action on behalf
26 of herself, and separately on behalf of affected members of the
27 general public, to challenge the unjust, unlawful, unfair and
28 fraudulent business practices of defendants in the manner in

1 which they handle mortgage loans on residential property in
2 California, as is more fully alleged herein. Plaintiff seeks
3 compensatory damages, punitive damages, statutory penalties,
4 rescission, restitution, disgorgement of profits, attorney's
5 fees, and costs. In support thereof, plaintiff hereby complains
6 and alleges as follows:

7
8 PARTIES

9 2. Plaintiff Patricia C. Barbera ("plaintiff") is a 73-year
10 old individual residing at all material times in the County of
11 Marin, California.

12 3. At all material times, defendant WMC Mortgage Corp.
13 ("WMC"), formerly known as WMC Finance Co., was and is an entity
14 formed by Apollo Management L.P. and an individual named Leon
15 Black and others who acquired Weyerhaeuser Mortgage Company and
16 Weyerhaeuser Insurance Services. WMC is a California corporation
17 with its corporate headquarters in Woodland Hills, California.
18 It operates throughout California making loans on residential
19 property and also acting as the administrator for those loans.
20 WMC also operates defendant WMCDirect, WMC's online nationwide
21 business services website for mortgage brokers. WMC claims that
22 "since its launch, in June 1999, online loan submissions have
23 totaled more than \$31 billion."

24 4. On June 14, 2004, defendant GE Consumer Finance Co., the
25 consumer lending unit of the General Electric Company (NYSE: GE)
26 purchased defendant WMC Finance Co., including defendants WMC and
27 WMCDirect, from affiliates of defendant Apollo Management L.P.

28 5. At all material times, defendant Fairbanks Capital Corp.

1 was and is a Utah corporation that acted on behalf of WMC as the
2 servicer of WMC's loans including WMC's loan to plaintiff.

3 6. At all material times, defendant Fairbanks Capital
4 Holding Corp. was and is a Delaware corporation which fully owns
5 and controls as a subsidiary defendant Fairbanks Capital Corp.

6 7. At all material times, defendant California Land Company
7 of Marin was and is a title company with its principal business
8 office in Marin County, California.

9 8. Plaintiff is ignorant of the true names and capacities of
10 defendants sued herein as Does 1 through 100, and therefore
11 plaintiff sues these defendants by such fictitious names.
12 Plaintiff is informed and believes and thereon alleges that each
13 of the fictitiously named defendants, including any such
14 defendants that may be the agents, representatives, or parent or
15 subsidiary corporations of the named defendants, is responsible
16 in some manner for the occurrences, events, transactions, and
17 damages alleged herein, and that plaintiff's damages as
18 hereinafter set forth were proximately caused by the Doe
19 defendants. Plaintiff will amend her complaint to state the true
20 names and capacities of the Doe defendants when they have been
21 ascertained.

22 9. Plaintiff is informed and believes and thereon alleges
23 that each of the defendants, including the Doe defendants, acted
24 in concert with each and every other defendant, and intended to
25 and did participate in the events, acts, practices and courses of
26 conduct alleged herein, and each was a proximate cause of the
27 damages and statutory violations alleged herein. At all times
28 herein mentioned, each defendant was the agent or employee of

1 each of the other defendants and was acting within the course and
2 scope of such agency or employment.

3 10. Plaintiff did not discover her causes of action against
4 defendants Fairbanks Capital Corp., Fairbanks Capital Holding
5 Corp., and California Land Title Company until approximately ten
6 months ago when defendant WMC produced documents that plaintiff
7 had been requesting for nearly a year pursuant to written
8 discovery. These documents show that the Fairbanks defendants
9 subsequently became the servicer for plaintiff's loan and that
10 California Land Title Company of Marin had improperly processed
11 escrow documents required for a loan that plaintiff had obtained
12 from WMC.

13 11. Each of the following causes of action arises from a
14 home loan that WMC made to plaintiff that was intended primarily
15 for personal, family or household use. This loan was a
16 "federally related mortgage loan" within the meaning of the Real
17 Estate Settlement Procedures Act ("RESPA").

18 12. Plaintiff is informed and believes, and based thereon
19 alleges, that WMC is a major "high cost" residential mortgage
20 lender which has made more than ten billion dollars in
21 residential mortgage loans secured primarily by first mortgage
22 liens on personal residences in the State of California.
23 Plaintiff is further informed and believes, and based thereon
24 alleges, that WMC has been in the business of making residential
25 mortgage loans and home equity loans as a "high-cost" predatory
26 lender for many years, primarily in the State of California.

SUMMARY OF FACTS

13. In June, 1997, plaintiff was in a desperate financial situation. She had pending against her a foreclosure action initiated by another lender with respect to her personal residence at 24 Caribe Isle, Novato, California. To avoid that foreclosure, plaintiff obtained a loan from WMC in the amount of \$322,500 at an annual percentage rate of 12.2573%.

14. On June 12, 1997, plaintiff executed loan documents at California Land Title Company of Marin. During the close of escrow, defendants failed to provide to plaintiff two written notices of plaintiff's right to rescind within three days of closing, and defendants failed to prepare and deliver accurate disclosures that were mandated under what is called TILA (the Truth in Lending Act, 15 U.S.C. sec. 1601. et. seq.) for the close of escrow in a home mortgage transaction. Plaintiff further alleges in this respect that defendants' failure to provide these right to rescind notices and to prepare and deliver properly required close of escrow documents as required by TILA was and continues to be a pattern of practice routinely carried out by defendants to defraud or to harm home loan borrowers. These practices caused WMC's loan agreement with plaintiff to be void.

15. On May 19, 1998, WMC notified plaintiff that it had not received proof of her renewal of the fire insurance policy on plaintiff's home. Despite plaintiff's numerous telephone calls to WMC and despite verification provided to WMC by plaintiff's insurance company that a copy of the insurance policy had been

1 mailed to WMC, WMC proceeded to force-place a substitute policy
2 from another fire insurance company at plaintiff's expense. On
3 October 13, 1998, plaintiff received a copy of the force-placed
4 policy, which reflected a premium of \$2,242, nearly three times
5 the annual premium for plaintiff's own policy of \$820, which
6 plaintiff had been regularly paying.

7 16. In January, 1999, after numerous telephone calls to WMC,
8 plaintiff received a letter dated January 19, 1999, advising her
9 that WMC had received recent confirmation of insurance coverage
10 for plaintiff's property and that WMC had canceled both the
11 force-placed insurance and its charge to plaintiff for that
12 policy.

13 17. Unbeknownst to plaintiff and contrary to its
14 representation, WMC failed to cancel the \$2,242 charge to
15 plaintiff's account and in fact continued to impose an annual
16 charge on plaintiff's account for this insurance without
17 notifying plaintiff.

18 18. On August 19, 1999, WMC served on plaintiff a ten-day
19 default notice listing amounts alleged due on the mortgage. The
20 amounts set forth in the default notice were false. They
21 exceeded the amounts due under the note by a substantial sum.
22 Using these excessive amounts as a pretext, on November 5, 1999,
23 WMC and its agent Millennium Foreclosure Services, LLC
24 ("Millennium"), served plaintiff with a notice of default, in the
25 amount of \$42,114.79.

26 19. On December 4, 1999, plaintiff sent a detailed letter to
27 both WMC and Millennium by facsimile. In her letter, which is
28 "qualified written request" within the meaning of RESPA at

1 subsection (e) of 12 U.S.C. §2605, plaintiff denied that she owed
2 WMC the amount shown in Millennium's notice of default and she
3 renewed her previous oral requests to WMC, starting in June,
4 1999, for an accurate accounting, as WMC's monthly payment coupon
5 sent to plaintiff contained erroneous accounting debits and
6 credits.

7 20. Subsection (e) of 12 U.S.C. §2605 of RESPA requires a
8 loan servicer to acknowledge receipt of a "qualified written
9 request" within 20 days and to respond to such a request within
10 60 days, excluding legal public holidays, Saturdays, and Sundays.

11 21. From June, 1999, until March 1, 2002, WMC violated RESPA
12 by failing to respond to plaintiff's oral requests and also by
13 failing to acknowledge or to respond within the statutory limits
14 to plaintiff's "qualified written requests." Not only did
15 defendants fail to respond to plaintiff's oral and written
16 requests, they continued to bill plaintiff for improper charges,
17 and they also attempted to carry out a foreclosure sale of
18 plaintiff's home based upon these improper charges. Plaintiff
19 further alleges that defendants' failure to deliver required
20 right to rescind notices and to prepare and process properly
21 other required close of escrow documents as required by TILA was
22 and continues to be a pattern of practice routinely carried out
23 by defendants to defraud or to harm home loan borrowers.

24 22. From the inception of this loan in June 1997 until
25 December 2003, WMC failed to produce documents that plaintiff had
26 been requesting for nearly a year pursuant to written discovery.
27 When they were finally produced, these documents showed that the
28 Fairbanks defendants subsequently became the servicer for

1 plaintiff's loan. Unbeknownst to plaintiff, WMC failed to
2 disclose that this loan servicing had been transferred to the
3 Fairbanks defendants.

4 23. On February 11, 2000 plaintiff received from Millennium
5 a Notice of Trustee's Sale recorded on February 7, 2000, citing a
6 sale date of March 2, 2000. The sale amount listed in the Notice
7 was \$372,316.39.

8 24. On February 27, 2000, plaintiff sent via facsimile to
9 WMC a copy of a telegram advising WMC that it had failed to
10 respond to plaintiff's previous letters, had failed to provide an
11 accurate accounting, and had violated various laws and
12 regulations.

13 25. On March 1, 2000, WMC supplied plaintiff with a
14 statement purportedly showing the history of payments on the
15 loan, but this statement was incomprehensible, as were WMC's
16 monthly loan statements.

17 26. On March 2, 2000, plaintiff notified WMC that she had
18 filed a Chapter 13 bankruptcy petition, and she verified that the
19 foreclosure had been canceled. On April 11, 2000, in violation
20 of the automatic bankruptcy stay, WMC filed a Notice of Trustee's
21 Sale scheduled for May 10, 2000.

22 27. This mortgage loan transaction with WMC was a consumer
23 credit transaction entered into by plaintiff for personal,
24 household or family purposes.

25 28. Plaintiff is informed and believes, and based thereon
26 alleges that the acts and the conduct of the defendants alleged
27 herein above are a violation of Civil Code § 1770, the Consumers
28 Legal Remedies Act ("CLRA"), including subsections (a)(8), (9),

1 (13), (14), (16) and (19), respectively.

2 29. Plaintiff has suffered substantial economic damage, and
3 other general and special damages, as a result of the herein-
4 mentioned violations of the Consumers Legal Remedies Act, in an
5 amount to be proven at time of trial.

6 30. Plaintiff is informed and believes, and based thereon
7 alleges, that defendants continue to engage in the above-
8 described deceptive practices, and that unless they be enjoined
9 from doing so by this court they will continue to do so, all to
10 the damage of its customers who will enter into home loan
11 mortgage transactions with the defendants.

12 31. The aforementioned violations of the Civil Code by
13 defendants were willful, despicable, cruel unjust, malicious,
14 fraudulent or oppressive, or were committed in conscious
15 disregard of the consequences to the plaintiff and other
16 consumers, thereby entitling plaintiff to punitive damages
17 pursuant to Civil Code §3294 and other California and federal
18 statutes.

19

20

FIRST CAUSE OF ACTION

21

(Unlawful predatory lending practices)

22

23 32. Plaintiff realleges and incorporates herein by reference
24 the allegations set forth in Paragraphs 1 through 31 above as if
fully alleged herein.

25

26 33. Defendant WMC has consistently engaged in what is called
27 predatory lending practices, that is, it preys upon borrowers who
28 have poor credit history or who have limited financial resources
or who are elderly. In doing so, WMC takes advantage of these

1 vulnerable borrowers by demanding that such borrowers, including,
2 for example, plaintiff, pay excessively high interest rates and
3 other excessive or unnecessary lending charges which are not
4 warranted by the particular circumstances of such borrowers. In
5 addition, defendant WMC engaged in pervasive and egregious
6 account practices, which, combined with its failure to respond to
7 "qualified written requests," enabled WMC to act within impunity
8 on a scale heretofore not recognized in California lending
9 practices.

10 34. These predatory lending practices are consistently
11 followed by WMC and constitute an unfair business practice under
12 what is called §17200 of the California Business & Professions
13 Code.

14 35. Wherefore, plaintiff, on behalf of herself and also on
15 behalf of the people of the State of California, seeks whatever
16 appropriate remedies would be available under §17200, including
17 without limitation statutory penalties, restitution, disgorgement
18 of profits, injunctive relief, and attorney's fees, and to bar
19 WMC from conducting business in the California home loan market.

20

21 SECOND CAUSE OF ACTION

22 (Consumer Legal Remedies Act)

23 36. Plaintiff realleges and incorporates herein by reference
24 the allegations set forth in Paragraphs 1 through 35 above as if
25 fully alleged herein.

26 37. Plaintiff is informed and believes, and thereon alleges,
27 that the acts and conduct of WMC as alleged in this complaint
28 violate various provisions of what is called the California

1 Consumers Legal Remedies Act, which is set forth in Civil Code
2 \$1750, et. seq.

3 38. As a proximate result of said violations, plaintiff has
4 suffered substantial economic damages and other general and
5 special damages in an amount to be proven at time of trial.

6 39. Wherefore, plaintiff seeks whatever appropriate remedies
7 would be available under \$1750, including without limitation
8 damages, statutory penalties, restitution, injunctive relief, and
9 attorney's fees.

10

11

THIRD CAUSE OF ACTION

12

(Truth in Lending Act)

13 40. Plaintiff realleges and incorporates herein by reference
14 the allegations set forth in Paragraphs 1 through 39 above as if
15 fully alleged herein.

16 41. Plaintiff is informed and believes, and thereon alleges,
17 that the acts and conduct of defendants as alleged in this
18 complaint violate various provisions of what is called the Truth
19 in Lending Act, 15 U.S.C. \$1601 et. seq. ("TILA"), Regulation Z,
20 and what is called the Home Ownership and Equity Protection Act,
21 15 U.S.C \$1639 ("HOEPA").

22 42. These violations include, without limitation, the
23 failure to provide to plaintiff the mandated written three-day
24 right to cancel notice prior to the presumed consummation date of
25 June 11, 1997. In addition, they failed to provide accurate
26 disclosures, as mandated by these statutes.

27 43. As a proximate result of said TILA, Regulation Z, and
28 HOEPA violations, plaintiff has suffered substantial economic

1 damages and other general and special damages in an amount to be
2 proven at time of trial, and she is entitled to rescission of her
3 loan transaction with WMC.

4 44. Wherefore, plaintiff seeks damages and whatever other
5 remedies are available under TILA, Regulation Z, and HOEPA,
6 including without limitation rescission of her loan transaction
7 with WMC.

8

9

FOURTH CAUSE OF ACTION

10

(Real Estate Settlement Procedures Act)

11

45. Plaintiff realleges and incorporates herein by reference
12 the allegations set forth in Paragraphs 1 through 44 above as if
13 fully alleged herein.

14

46. Plaintiff is informed and believes, and thereon alleges,
15 that the acts and conduct of defendants as alleged in this
16 complaint violate various provisions of what is called the Real
17 Estate Settlement Procedures Act, 12 U.S.C. §2601, et. seq.
18 ("RESPA").

19

47. These violations include without limitation kickbacks,
20 referral fees, unnecessary escrow accounts for taxes and
21 insurance, improper or inaccurate reporting to credit borrowers,
22 failure to disclose the transfer of the servicing, failure to
23 respond to a "qualified written request", failure to "receive
24 payments from a borrower" and "making the payments of principal
25 and interest as may be required pursuant to the terms of the
26 loan" and other home mortgage lending practices that tend to
27 cause excessive borrowing costs for home loans.

28

48. As a proximate result of said RESPA violations,

1 plaintiff has suffered substantial economic damages and other
2 general and special damages in an amount to be proven at time of
3 trial, and she is entitled to rescission of her loan transaction
4 with WMC.

5 49. Wherefore, plaintiff seeks damages and whatever other
6 remedies are available under RESPA.

7
8 FIFTH CAUSE OF ACTION

9 (Debt Collection Violations)

10 50. Plaintiff realleges and incorporates herein by
11 reference the allegations set forth in Paragraphs 1 through 49
12 above as if fully alleged herein.

13 51. Plaintiff is informed and believes, and thereon alleges,
14 that the acts and conduct of defendants as alleged in this
15 complaint violate various provisions of what is called the
16 Federal Fair Debt Collections Practices Act, 15 U.S.C. §1692 et.
17 seq., including, for example, improper or inaccurate reports to
18 credit borrowers. In addition, it is a violation of Real Estate
19 Settlement Procedures Act, 12 U.S.C. §2605(3)(d), i.e.,
20 protection of credit rating. Servicer may not provide information
21 regarding any overdue payment to any consumer reporting agency.

22 52. As a proximate result of said violations, plaintiff has
23 suffered substantial economic damages and emotional distress and
24 other general and special damages in an amount to be proven at
25 time of trial.

26 53. Wherefore, plaintiff seeks whatever remedies may be
27 available under this federal debt collections statute, including
28 without limitation compensatory damages, statutory damages,

1 statutory penalties and attorney's fees.

2

3

SIXTH CAUSE OF ACTION

4

(Lending Fraud)

5 54. Plaintiff realleges and incorporates herein by reference
6 the allegations set forth in Paragraphs 1 through 53 above as if
7 fully alleged herein.

8 55. At the time WMC made to plaintiff the home loan which is
9 the subject of this complaint, WMC made various representations
10 to plaintiff, including without limitation that WMC would service
11 plaintiff's loan honestly and fairly and accurately, using
12 accurate accounting procedures, and would send to plaintiff
13 accurate statements regarding loan payments, loan balances,
14 escrow charges, and other loan charges stated in connection with
15 WMC's loan to plaintiff.

16 56. Said representations were false. In truth, as part of
17 its predatory lending practices WMC intended to misstate the
18 amounts due under its loan to plaintiff in order to obtain
19 greater compensation under the loan than was permitted either by
20 the loan contract or by the various statutory consumer
21 protections that have been enacted to prevent predatory lending
22 practices.

23 57. Plaintiff relied upon the representations of WMC, as
24 alleged above, and plaintiff's reliance was reasonable in view of
25 the fact that at the time of this loan she was led to believe by
26 WMC that WMC was a highly ethical and honest home loan lender.

27 58. As a proximate result of said lending fraud, plaintiff
28 has suffered substantial economic damages and other general and

1 special damages in an amount to be proven at time of trial, and
2 she is entitled to rescission of her loan transaction with WMC.

3 59. Wherefore, plaintiff seeks both economic and non-
4 economic damages in such amounts as may be allowed at time of
5 trial.

6
7 SEVENTH CAUSE OF ACTION

8 (Breach of Contract)

9 60. Plaintiff realleges and incorporates herein by reference
10 the allegations set forth in Paragraphs 1 through 59 above as if
11 fully alleged herein.

12 61. On or about June 1997, plaintiff entered into a written
13 contract with defendant WMC whereby WMC agreed to loan plaintiff
14 the sum of \$322,500 secured by a mortgage recorded against
15 plaintiff's home in Marin County, California. In that home loan
16 agreement, WMC promised, inter alia, that so long as plaintiff
17 timely made monthly payments, plaintiff would have thirty years
18 in which to repay all sums due under the loan.

19 62. WMC breached this home loan agreement by declaring the
20 loan in default, by demanding that plaintiff pay charges that
21 were not due under the loan, and by attempting to exercise
22 foreclosure rights given to WMC in the mortgage securing loan,
23 even though WMC did not have the right to exercise such
24 foreclosure rights.

25 63. As a proximate result of WMC's breach of this home loan
26 agreement as alleged above, plaintiff has sustained compensatory
27 damages in an amount to be determined at time of trial,
28 including, without limitation, damages she sustained when she was

1 forced to seek bankruptcy court protection.

2 64. Wherefore, plaintiff seeks compensatory damages in such
3 amounts as may be allowed by the court at time of trial.

4

5

EIGHTH CAUSE OF ACTION

6

(Elder Abuse)

7

65. Plaintiff realleges and incorporates herein by reference
8 the allegations set forth in Paragraphs 1 through 59 above as if
9 fully alleged herein.

10

66. The acts and practices of defendants as alleged in this
11 complaint constitutes what is called under California law elder
12 abuse as that term is used in Welfare & Institutions Code §15600
13 et. seq.

14

67. Elder abuse occurred in the present case because
15 plaintiff is a person 65 years of age or older residing in
16 California; defendants engaged in conduct which resulted in
17 plaintiff being subjected to financial abuse; and as a proximate
18 result of the conduct of defendants, plaintiff sustained injury,
19 damage, loss or harm to plaintiff's home in Marin County,
20 California.

21

68. Wherefore, as a proximate result of said elder abuse,
22 plaintiff seeks economic and non-economic damages in such amounts
23 as such may be allowed at time of trial.

24

25

NINTH CAUSE OF ACTION

26

(Usury Damages)

27

69. Plaintiff realleges and incorporates herein by reference
28 the allegations set forth in Paragraphs 1 through 68 above as if

1 fully alleged herein.

2 70. The interest rate charged by defendants for the WMC loan
3 which is the subject of this complaint was usurious as that term
4 is defined and applied by the California Constitution.

5 71. Wherefore, plaintiff is entitled to such damages as the
6 usury laws of California may allow.

7

8

TENTH CAUSE OF ACTION

9

(Rescission)

10 72. Plaintiff realleges and incorporates herein by reference
11 the allegations set forth in Paragraphs 1 through 71 above as if
12 fully alleged herein.

13 73. At the time defendant WMC made to plaintiff the home
14 loan which is the subject of this complaint, defendant WMC made
15 various representations to plaintiff, including without
16 limitation that defendant WMC would service plaintiff's loan
17 honestly and fairly and accurately, using accurate accounting
18 procedures, and would send to plaintiff accurate statements
19 regarding loan payments, loan balances, escrow charges, and other
20 loan charges stated in connection with defendant WMC's loan to
21 plaintiff.

22 74. Said representations were false. In truth, as part of
23 its predatory lending practices defendant WMC intended to
24 misstate the amounts due under its loan to plaintiff in order to
25 obtain greater compensation under the loan than was permitted
26 either by the loan contract or by the various statutory consumer
27 protections that have been enacted to prevent predatory lending
28 practices.

1 75. Plaintiff relied upon the representations of defendant
2 WMC, as alleged above, and plaintiff's reliance was reasonable in
3 view of the fact that at the time of this loan she was led to
4 believe by defendant WMC that WMC was a highly ethical and honest
5 home loan lender.

6 76. As a proximate result of said misrepresentations,
7 plaintiff has suffered substantial economic damages and emotional
8 distress and other general and special damages in an amount to be
9 proven at time of trial.

10 77. Wherefore, plaintiff seeks rescission of her loan
11 transaction with WMC Mortgage, including without limitation
12 cancellation of the loan and the rescission of the loan contract
13 and rescission of any other documents related to or made a part
14 of the loan contract, and she also seeks restitution of all
15 monies she has paid to WMC which under California or federal law
16 WMC was not entitled to receive.

17
18 PUNITIVE DAMAGES

19 78. Plaintiff realleges and incorporates herein by reference
20 the allegations set forth in paragraphs 1 through 70 above as if
21 fully alleged herein.

22 79. As a proximate result of the statutory violations and
23 the fraud and the usury violations and the elder abuse alleged in
24 this complaint, plaintiff is entitled to an award of punitive
25 damages pursuant to the provisions of Civil Code §3294.

26
27 PRAYER

28 a. Plaintiff seeks both economic and non-economic

1 compensatory damages to the extent allowed by any of the causes
2 of action alleged in this complaint.

3 b. Plaintiff seeks statutory penalties to the extent allowed
4 by any of the causes of action alleged in this complaint.

5 c. Plaintiff seeks rescission and restitution and
6 disgorgement to the extent allowed by any of the causes of action
7 alleged in this complaint.

8 d. Plaintiff seeks elder abuse and usury damages to the
9 extent allowed by any of the causes of action alleged in this
10 complaint.

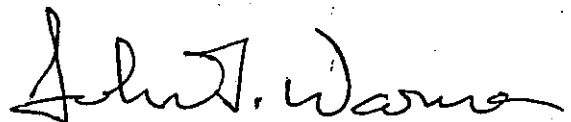
11 e. Plaintiff seeks punitive damages to the extent allowed by
12 any of the causes of action alleged in this complaint.

13 f. Plaintiff seeks attorney's fees to the extent allowed by
14 any of the causes of action alleged in this complaint.

15 g. Plaintiff seeks costs of suit to the extent allowed by
16 any of the causes of action alleged in this complaint.

17 h. Plaintiff seeks such other and further relief that the
18 court may allow.

19
20
21 July 22, 2004



John G. Warner
Attorney for Plaintiff
Patricia C. Barbera

EXHIBIT “B”

MICHAEL J. AGOGLIA (CA SBN 154810)
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NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Patricia C. Barbera,

Plaintiff,

v.

Case No.

C 04 3738

WMC Mortgage Corp., a California Corporation;
WMC Finance Co.; Apollo Management L.P.;
WMCDirect; GE Consumer Finance, a unit of
General Electric Company; Fairbanks Capital
Corp., a Utah Corporation; Fairbanks Capital
Holding Corp., a Delaware Corporation;
California Land Title Company of Marin, a
California business entity; Does 1 through 100,
inclusive.,

Defendants.

NOTICE OF REMOVAL OF
ACTION PURSUANT TO
28 U.S.C. § 1441 (B) AND (C)

(FEDERAL QUESTION
JURISDICTION)

TO THE CLERK OF THE UNITED STATES DISTRICT COURT AND PLAINTIFF:

PLEASE TAKE NOTICE that defendants WMC Mortgage Corp., WMC Finance Co.,
Apollo Management L.P., WMCDirect, and GE Consumer Finance (collectively the "Removing
Defendants") hereby remove to this Court the state court action described below.

1. On July 23, 2004, an action was commenced in the Superior Court of the State of
California in and for the County of San Francisco, entitled *Barbera v. WMC Mortgage Corp., et*

1 *al.*, Case No. JGC-04-433269. A copy of the complaint in that action (the "Complaint") is
2 attached hereto as Exhibit A.

3 2. Defendant WMC Finance Co. received a copy of the Summons and Complaint by
4 mail on August 6, 2004. A copy of the Notice of Service of Process is attached hereto as
5 Exhibit B. None of the other Removing Defendants received a copy of the Complaint prior to
6 August 4, 2004.

7 3. This Notice of Removal is timely filed as required by 28 U.S.C. § 1446(b) since it
8 is filed within thirty days after service on the defendants of a copy of the Summons and the
9 Complaint commencing the action.

10 4. Plaintiff served defendant California Land Title Company of Marin ("California
11 Land Title") with the Complaint and Summons on August 12, 2004. California Land Title has
12 informed the Removing Defendants that it consents to the removal of the action to this Court. A
13 copy of California Land Title's consent to removal is attached hereto as Exhibit C.

14 5. The official docket in the state court proceeding does not reflect as of this date that
15 either defendant Fairbanks Capital Corp. or defendant Fairbanks Capital Holding Corp were
16 served with the Summons and Complaint. A copy of the state court docket is attached hereto as
17 Exhibit D.

18 6. The Complaint purports to state claims against defendants, *inter alia*, for alleged
19 violations of the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA"), the Home Ownership
20 and Equity Protection Act, 15 U.S.C. § 1639 ("HOEPA"), and the Real Estate Settlement
21 Procedures Act, 12 U.S.C. § 2601, *et seq.* ("RESPA").

22 7. Removal is therefore proper pursuant to 28 U.S.C. § 1441(b) and (c).

23 8. Defendants have taken no action in the state court proceeding, and no further
24 proceedings have occurred in this matter in the state court.

25 9. Promptly after the filing of this Notice of Removal, the Removing Defendants
26 shall give written notice to Plaintiff of the filing of this Notice and shall, pursuant to 28 U.S.C. §
27 446(d), file a copy of this Notice with the Clerk of the Superior Court of the State of California
28 for the County of San Francisco.

1 10. Pursuant to 28 U.S.C. § 1446(a), the Removing Defendants file this Notice of
2 Removal in this district and division in which the Action was filed. Under this Court's Local
3 Rules, the Action should be assigned to the San Francisco or the Oakland Division of the
4 Northern District of California because the cause of action allegedly arose in Marin County,
5 California. Local Rule 3-2(d).

6 11. The Removing Defendants are represented by the undersigned attorney who
7 certifies, pursuant to Rule 11 of the Federal Rules of Civil Procedure, that the foregoing is true
8 and correct.

9 Dated: September 3, 2004

MICHAEL J. AGOGLIA
MORRISON & FOERSTER LLP

By: 

Michael J. Agolia

Attorneys for Defendant
WMC MORTGAGE CORP., WMC
FINANCE CO., APOLLO
MANAGEMENT L.P., WMCDIRECT,
AND GE CONSUMER FINANCE

27 sf-1772165

28 NOTICE OF REMOVAL

EXHIBIT “C”

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5 Attorney for Plaintiff
6 Patricia C. Barbera

7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
9 OAKLAND DIVISION

10 Patricia C. Barbera,

11 Plaintiff,

12 vs.
13

14
15 WMC Mortgage Corp., a
California Corporation; WMC
16 Direct, a California business
entity; Select Portfolio
17 Servicing, Inc.; a Utah
business entity; California
18 Land Title Company of Marin, a
California business entity;
19 Does 1 through 100, inclusive,

20 Defendants.
21

Case No. C-04-03738-SBA

FIRST AMENDED COMPLAINT TO BAR
PREDATORY LENDING AND OTHER
UNFAIR BUSINESS PRACTICES; FOR
REMEDIES UNDER CALIFORNIA
CONSUMERS LEGAL REMEDIES ACT AND
UNDER VARIOUS FEDERAL HOME LOAN
PROTECTION STATUTES; FOR WRONGFUL
CONCEALMENT; FOR BREACH OF
CONTRACT; FOR USURY; FOR
RESCISSION OF HOME LOAN MORTGAGE;
FOR ACCOUNTING; FOR BREACH OF
FIDUCIARY DUTY; AND FOR
NEGLIGENCE.

CLASS ACTION (IF APPROPRIATE)

Demand for Jury Trial

Type of Case:

Unfair Business Practice

22
23
24
25 INTRODUCTION

26 1. Plaintiff Patricia C. Barbera brings this action on
27 behalf of herself, and separately on behalf of affected members
28 of the general public, to challenge the unjust, unlawful, unfair

1 and fraudulent business practices of defendants in the manner in
2 which they handle mortgage loans on residential property in
3 California, as is more fully alleged herein. Plaintiff seeks
4 compensatory damages, punitive damages, statutory penalties,
5 rescission, restitution, disgorgement of profits, attorney's
6 fees, and costs. In support thereof, plaintiff hereby complains
7 and alleges as follows:

8
9 PARTIES

10 2. Plaintiff Patricia C. Barbera ("plaintiff") is a 73-year
11 old individual residing at all material times in the County of
12 Marin, California.

13 3. At all material times, defendant WMC Mortgage Corp.
14 ("WMC"), formerly known as WMC Finance Co., was and is an entity
15 formed by Apollo Management L.P. and an individual named Leon
16 Black and others who acquired Weyerhaeuser Mortgage Company and
17 Weyerhaeuser Insurance Services. WMC is a California corporation
18 with its corporate headquarters in Woodland Hills, California.
19 It operates throughout California making subprime loans on
20 residential property and it also acts as the administrator for
21 those loans. WMC also owns and operates defendant WMCDirect,
22 WMC's online nationwide business services website for mortgage
23 brokers. WMC claims that "since its launch, in June 1999, online
24 loan submissions have totaled more than \$31 billion."

25 4. On June 14, 2004, GE Consumer Finance Co., the consumer
26 lending unit of the General Electric Company (NYSE: GE) purchased
27 WMC Finance Co., including defendants WMC and WMCDirect, from
28 affiliates of Apollo Management L.P.

1 5. At all material times, defendant Select Portfolio
2 Servicing, Inc. ("SPS"), formerly known as Fairbanks Capital
3 Corp., was and is a Utah corporation that acts on behalf of WMC
4 as the servicer of WMC's loans, including WMC's loan to
5 plaintiff.

6 6. At all material times, Fairbanks Capital Holding Corp.
7 was and is a Delaware corporation which fully owns and controls
8 as a subsidiary defendant SPS.

9 7. At all material times, defendant California Land Company
10 of Marin ("Cal Land") was and is a title company with its
11 principal business office in Marin County, California.

12 8. Plaintiff is ignorant of the true names and capacities of
13 defendants sued herein as Does 1 through 100, and therefore
14 plaintiff sues these defendants by such fictitious names.
15 Plaintiff is informed and believes and thereon alleges that each
16 of the fictitiously named defendants, including any such
17 defendants that may be the agents, representatives, or parent or
18 subsidiary corporations of the named defendants, is responsible
19 in some manner for the occurrences, events, transactions, and
20 damages alleged herein, and that plaintiff's damages as
21 hereinafter set forth were proximately caused by the Doe
22 defendants. Plaintiff will amend her complaint to state the true
23 names and capacities of the Doe defendants when they have been
24 ascertained.

25 9. Plaintiff is informed and believes and thereon alleges
26 that each of the defendants, including the Doe defendants, acted
27 in concert with each and every other defendant, and intended to
28 and did participate in the events, acts, practices and courses of

1 conduct alleged herein, and each was a proximate cause of the
2 damages and statutory violations alleged herein. At all times
3 herein mentioned, each defendant was the agent or employee of
4 each of the other defendants and was acting within the course and
5 scope of such agency or employment.

6 10. Plaintiff did not discover her causes of action against
7 defendants SPS and Cal Land until approximately ten months ago
8 when defendant WMC produced documents that plaintiff had been
9 requesting for nearly a year pursuant to written discovery that
10 plaintiff propounded in a pending state court case. These
11 documents show that SPS's predecessor, Fairbanks, subsequent to
12 loan origination became the servicer for plaintiff's loan and
13 that Cal Land had improperly processed escrow documents required
14 for the loan that plaintiff had obtained from WMC.

15 11. Each of the following causes of action arises from a
16 home loan that WMC made to plaintiff that was intended primarily
17 for personal, family or household use. This loan was a
18 "federally related mortgage loan" within the meaning of the Real
19 Estate Settlement Procedures Act ("RESPA").

20 12. Plaintiff is informed and believes, and based thereon
21 alleges, that WMC is a major "high cost" residential subprime
22 mortgage lender which has made more than ten billion dollars in
23 residential mortgage loans secured primarily by first mortgage
24 liens on personal residences in the State of California.
25 Plaintiff is further informed and believes, and based thereon
26 alleges, that WMC has been in the business of making residential
27 subprime mortgage loans and home equity loans as a "high-cost"
28

1 predatory lender for many years, primarily in the State of
2 California.

3 SUMMARY OF FACTS

4 13. In June, 1997, plaintiff was in a desperate financial
5 situation. She had pending against her a foreclosure action
6 initiated by another lender with respect to her personal
7 residence at 24 Caribe Isle, Novato, California. To avoid that
8 foreclosure, plaintiff obtained a loan from WMC in the amount of
9 \$322,500 at an annual percentage rate of 12.2573%.

10 14. On June 12, 1997, plaintiff executed loan documents at
11 Cal Land. During the close of escrow, defendants failed to
12 provide to plaintiff two written notices of plaintiff's right to
13 rescind within three days of closing, and defendants failed to
14 prepare and deliver accurate disclosures that were mandated under
15 what is called TILA (the Truth in Lending Act, 15 U.S.C. sec.
16 1601. et seq.) for the close of escrow in a home mortgage
17 transaction. Plaintiff further alleges in this respect that
18 defendants' failure to provide these right to rescind notices and
19 to prepare and deliver properly drafted close of escrow documents
20 as required by TILA was and continues to be a pattern of practice
21 routinely carried out by defendants to defraud or to harm home
22 loan borrowers. These practices caused WMC's loan agreement with
23 plaintiff to be void.

24 15. On May 19, 1998, WMC notified plaintiff that it had not
25 received proof of her renewal of the hazard insurance policy on
26 plaintiff's home. Despite plaintiff's numerous telephone calls
27 to WMC and despite verification provided to WMC by plaintiff's
28 insurance company that a copy of plaintiff's insurance policy had

1 been mailed to WMC, WMC proceeded to force-place a substitute
2 policy from another hazard insurance company at plaintiff's
3 expense. On October 13, 1998, plaintiff received a copy of the
4 force-placed policy, which reflected a premium of \$2,242, nearly
5 three times the annual premium for plaintiff's own policy of
6 \$820, which plaintiff had been regularly paying.

7 16. In January, 1999, after numerous telephone calls to WMC,
8 plaintiff received a letter dated January 19, 1999, advising her
9 that WMC had received recent confirmation of hazard insurance
10 coverage for plaintiff's property and that WMC had canceled both
11 the force-placed insurance and its charge to plaintiff for that
12 policy.

13 17. Unbeknownst to plaintiff and contrary to WMC's
14 representation, WMC failed to cancel the \$2,242 charge to
15 plaintiff's account for hazard insurance, and in fact WMC
16 continued to impose an annual charge on plaintiff's account for
17 this hazard insurance without notifying plaintiff.

18 18. On August 19, 1999, WMC served on plaintiff a ten-day
19 default notice listing amounts alleged due on plaintiff's
20 mortgage. The amounts set forth in the default notice were
21 false. They exceeded the amounts due under the note by a
22 substantial sum. Using these excessive amounts as a pretext, on
23 November 5, 1999, WMC and its foreclosure agent, Millennium
24 Foreclosure Services, LLC ("Millennium"), served plaintiff with a
25 notice of default in the amount of \$42,114.79.

26 19. On December 4, 1999, plaintiff sent a detailed letter to
27 both WMC and Millennium by facsimile. In her letter, which is
28 "qualified written request" within the meaning of RESPA at

1 subsection (e) of 12 U.S.C. §2605, plaintiff denied that she owed
2 WMC the amount shown in Millennium's notice of default and she
3 renewed her previous oral requests to WMC, starting in June,
4 1999, for an accurate accounting, as WMC's monthly payment
5 coupons sent to plaintiff contained erroneous accounting debits
6 and credits.

7 20. Subsection (e) of 12 U.S.C. §2605 of RESPA requires a
8 loan servicer to acknowledge receipt of a "qualified written
9 request" within 20 days and to respond to such a request within
10 60 days, excluding legal public holidays, Saturdays, and Sundays.

11 21. Beginning June, 1999, through March 1, 2002, WMC
12 violated RESPA by failing to respond to plaintiff's oral requests
13 and also by failing to acknowledge or to respond within the
14 statutory time limits to plaintiff's "qualified written
15 requests." Not only did WMC fail to respond to plaintiff's oral
16 and written requests, it continued to bill plaintiff for improper
17 charges, and it also attempted to carry out a foreclosure sale of
18 plaintiff's home based upon these improper charges. Plaintiff
19 further alleges that WMC's failure to deliver the required right
20 to rescind notices and to prepare and process properly drafted
21 close of escrow documents as required by TILA was and continues
22 to be a pattern of practice routinely carried out by WMC to
23 defraud or to harm home loan borrowers.

24 22. From the inception of this loan in June 1997 through
25 December 2003, WMC failed to produce documents that plaintiff had
26 been requesting pursuant to written discovery she had propounded
27 in a pending state court case. When they were finally produced,
28 these documents showed that Fairbanks, now called SPS,

1 subsequently became the servicer for plaintiff's loan.
2 Unbeknownst to plaintiff, WMC failed to disclose that this loan
3 servicing had been transferred to Fairbanks.

4 23. On February 11, 2000 plaintiff received from Millennium
5 a Notice of Trustee's Sale recorded on February 7, 2000, citing a
6 sale date of March 2, 2000. The sale amount listed in the Notice
7 was \$372,316.39.

8 24. On February 27, 2000, plaintiff sent via facsimile to
9 WMC a copy of a telegram advising WMC that it had failed to
10 respond to plaintiff's previous letters, had failed to provide an
11 accurate accounting, and had violated various laws and
12 regulations.

13 25. On March 1, 2000, WMC supplied plaintiff with a
14 statement purportedly showing the history of payments on the
15 loan, but this statement was incomprehensible, as were WMC's
16 monthly loan statements.

17 26. On March 2, 2000, plaintiff notified WMC that she had
18 filed a Chapter 13 bankruptcy petition, and she verified that the
19 foreclosure had been canceled. On April 11, 2000, in violation
20 of the automatic bankruptcy stay, WMC filed a Notice of Trustee's
21 Sale scheduled for May 10, 2000.

22 27. This mortgage loan transaction with WMC was a consumer
23 credit transaction entered into by plaintiff for personal,
24 household or family purposes.

25 28. Plaintiff is informed and believes, and based thereon
26 alleges that the acts and the conduct of the defendants alleged
27 herein above are a violation of Civil Code § 1770, the Consumers
28 Legal Remedies Act ("CLRA"), including subsections (a)(8), (9),

1 (13), (14), (16) and (19), respectively.

2 29. Plaintiff has suffered substantial economic damage, and
3 other general and special damages, as a result of the herein-
4 mentioned violations of the Consumers Legal Remedies Act, in an
5 amount to be proven at time of trial.

6 30. Plaintiff is informed and believes, and based thereon
7 alleges, that defendants continue to engage in the above-
8 described deceptive practices, and that unless they be enjoined
9 from doing so by this court they will continue to do so, all to
10 the damage of its customers who will enter into home loan
11 mortgage transactions with the defendants.

12 31. The aforementioned violations of the Civil Code by
13 defendants were willful, despicable, cruel unjust, malicious,
14 fraudulent or oppressive, or were committed in conscious
15 disregard of the consequences to the plaintiff and other
16 consumers, thereby entitling plaintiff to punitive damages
17 pursuant to Civil Code §3294 and other California and federal
18 statutes.

19
20 FIRST CAUSE OF ACTION

21 (Defendant WMC Only)

22 (Unlawful predatory lending practices)

23 32. Plaintiff realleges and incorporates herein by reference
24 the allegations set forth in Paragraphs 1 through 31 above as if
25 fully alleged herein.

26 33. Defendant WMC has consistently engaged in what is called
27 predatory lending practices, that is, it preys upon borrowers who
28 have poor credit history or who have limited financial resources

1 or who are elderly. In doing so, WMC takes advantage of these
2 vulnerable borrowers by demanding that such borrowers, including,
3 for example, plaintiff, pay excessively high interest rates and
4 other excessive or unnecessary lending charges which are not
5 warranted by the creditworthiness of such borrowers. In
6 addition, defendant WMC engaged in pervasive and egregious
7 accounting practices, which, combined with its failure to respond
8 to "qualified written requests," enabled WMC to act with impunity
9 on a scale heretofore not recognized in California home loan
10 lending practices.

11 34. These predatory lending practices are consistently
12 followed by WMC and constitute an unfair business practice under
13 what is called §17200 of the California Business & Professions
14 Code.

15 35. Wherefore, plaintiff, on behalf of herself and also on
16 behalf of the people of the State of California, seeks whatever
17 appropriate remedies would be available under §17200, including
18 without limitation statutory penalties, restitution, disgorgement
19 of profits, injunctive relief, and attorney's fees, and she seeks
20 to bar WMC from conducting business in the California home loan
21 market.

22
23 SECOND CAUSE OF ACTION

24 (Consumer Legal Remedies Act)

25 (Defendants WMC and SPS Only)

26 36. Plaintiff realleges and incorporates herein by reference
27 the allegations set forth in Paragraphs 1 through 35 above as if
28 fully alleged herein.

1 37. Plaintiff is informed and believes, and thereon alleges,
2 that the acts and conduct of WMC and SPS as alleged in this
3 complaint violate various provisions of what is called the
4 California Consumers Legal Remedies Act, which is set forth in
5 Civil Code §1750, et seq. These violations began when the loan
6 was placed in June 1977 and they continue through the present
7 time.

8 38. As a proximate result of said violations, plaintiff has
9 suffered substantial economic damages and other general and
10 special damages in an amount to be proven at time of trial.

11 39. Wherefore, plaintiff seeks whatever appropriate remedies
12 would be available under §1750, et seq., including without
13 limitation damages, statutory penalties, restitution, injunctive
14 relief, and attorney's fees.

15
16 THIRD CAUSE OF ACTION

17 (Truth in Lending Act)

18 (Defendants WMC and Cal Land Only)

19 40. Plaintiff realleges and incorporates herein by reference
20 the allegations set forth in Paragraphs 1 through 39 above as if
21 fully alleged herein.

22 41. Plaintiff is informed and believes, and thereon alleges,
23 that the acts and conduct of defendants as alleged in this
24 complaint violate various provisions of what is called the Truth
25 in Lending Act, 15 U.S.C. §1601 et seq. ("TILA"), Regulation Z,
26 and what is called the Home Ownership and Equity Protection Act,
27 15 U.S.C §1639 ("HOEPA").

28 42. These violations include, without limitation, the

1 failure to provide to plaintiff the mandated written three-day
2 right to cancel notice prior to the presumed loan closing date of
3 June 11, 1997. In addition, defendants failed to provide accurate
4 disclosures, as mandated by these statutes. Any statute of
5 limitations applicable to these violations has been tolled under
6 the doctrine of what is called equitable tolling.

7 43. As a proximate result of said TILA, Regulation Z, and
8 HOEPA violations, plaintiff has suffered substantial economic
9 damages and other general and special damages in an amount to be
10 proven at time of trial, and she is entitled to rescission of her
11 loan transaction with WMC.

12 44. Wherefore, plaintiff seeks damages and whatever other
13 remedies are available under TILA, Regulation Z, and HOEPA,
14 including without limitation rescission of her loan transaction
15 with WMC.

16
17 FOURTH CAUSE OF ACTION

18 (Real Estate Settlement Procedures Act)

19 (Defendants WMC and SPS Only)

20 45. Plaintiff realleges and incorporates herein by reference
21 the allegations set forth in Paragraphs 1 through 44 above as if
22 fully alleged herein.

23 46. Plaintiff is informed and believes, and thereon alleges,
24 that the acts and conduct of defendants as alleged in this
25 complaint violate various provisions of what is called the Real
26 Estate Settlement Procedures Act, 12 U.S.C. §2601, et seq.
27 ("RESPA"). These violations began when the loan was placed in
28 June 1997 and they continue through the present time.

1 47. These violations include, without limitation, kickbacks,
2 referral fees, unnecessary escrow accounts for taxes and hazard
3 insurance, improper or inaccurate reporting to credit bureaus,
4 failure to disclose the transfer of the servicing of plaintiff's
5 loan account, failure to respond to acknowledge "payments from a
6 borrower" and to acknowledge "making the payments of principal
7 and interest as may be required pursuant to the terms of the
8 loan," and other home mortgage lending practices that tend to
9 cause excessive borrowing costs for home loan borrowers.

10 48. As a proximate result of said RESPA violations,
11 plaintiff has suffered substantial economic damages and other
12 general and special damages in an amount to be proven at time of
13 trial, and she is entitled to rescission of her loan transaction
14 with WMC.

15 49. Wherefore, plaintiff seeks damages and whatever other
16 remedies are available under RESPA.

17
18 FIFTH CAUSE OF ACTION

19 (Debt Collection Violations)

20 (Defendants WMC and SPS Only)

21 50. Plaintiff realleges and incorporates herein by
22 reference the allegations set forth in Paragraphs 1 through 49
23 above as if fully alleged herein.

24 51. Plaintiff is informed and believes, and thereon alleges,
25 that the acts and conduct of defendants as alleged in this
26 complaint violate various provisions of what is called the
27 Federal Fair Debt Collections Practices Act, 15 U.S.C. §1692 et
28 seq., including, for example, improper or inaccurate reports to

1 credit borrowers. In addition, it is a violation of RESPA, 12
2 U.S.C. §2605(3)(d), which protects a borrower's credit rating.
3 The loan servicer may not provide information regarding any
4 overdue payment to any consumer reporting agency. These
5 violations began when plaintiff's loan was placed in June 1997
6 and they continue through the present time.

7 52. As a proximate result of said violations, plaintiff has
8 suffered substantial economic damages and emotional distress and
9 other general and special damages in an amount to be proven at
10 time of trial.

11 53. Wherefore, plaintiff seeks whatever remedies may be
12 available under this federal debt collections statute and under
13 RESPA, including, without limitation, compensatory damages,
14 statutory damages, statutory penalties and attorney's fees.
15

16 SIXTH CAUSE OF ACTION

17 (Wrongful Concealment)

18 (Defendant WMC Only)

19 54. Plaintiff realleges and incorporates herein by reference
20 the allegations set forth in Paragraphs 1 through 53 above as if
21 fully alleged herein.

22 55. At the time in June 1997 when WMC made to plaintiff the
23 home loan which is the subject of this complaint, WMC implied in
24 its loan documents that WMC would service plaintiff's loan
25 honestly and fairly and accurately, using accurate accounting
26 procedures, that it would send to plaintiff accurate statements
27 regarding loan payments, loan balances, escrow charges, and other
28 loan charges stated in connection with WMC's loan to plaintiff,

1 and that it would not force place hazard insurance unless there
2 was clear and convincing proof that plaintiff was uninsured.

3 56. Said implied representations were false. In truth, as
4 part of its predatory lending practices WMC intended to misstate
5 the amounts due under its loan to plaintiff in order to obtain
6 greater compensation under the loan than was permitted either by
7 the loan contract itself or by the various statutory consumer
8 protections that have been enacted to prevent predatory lending
9 practices, and it force placed hazard insurance even though the
10 evidence indicated that no such hazard insurance was needed.

11 57. Plaintiff relied upon the representations of WMC, as
12 alleged above, and plaintiff's reliance was reasonable in view of
13 the fact that at the time that when WMC made this loan, it led
14 plaintiff to believe that WMC was a highly ethical and honest
15 home loan lender. Plaintiff did not discover the falsity of
16 WMC's implied representations until within three years of the
17 filing of this complaint.

18 58. As a proximate result of said wrongful concealment,
19 plaintiff has suffered substantial economic damages and other
20 general and special damages in an amount to be proven at time of
21 trial, and she is entitled to rescission of her loan transaction
22 with WMC.

23 59. Wherefore, plaintiff seeks both economic and non-
24 economic damages in such amounts as may be allowed at time of
25 trial.

26
27
28

1 SEVENTH CAUSE OF ACTION

2 (Breach of Contract)

3 (Defendant WMC Only)

4 60. Plaintiff realleges and incorporates herein by reference
5 the allegations set forth in Paragraphs 1 through 59 above as if
6 fully alleged herein.

7 61. On or about June 1997, plaintiff entered into a written
8 contract with defendant WMC whereby WMC agreed to loan plaintiff
9 the sum of \$322,500 secured by a mortgage recorded against
10 plaintiff's home in Marin County, California. In that home loan
11 agreement, WMC promised, inter alia, that so long as plaintiff
12 timely made monthly payments, plaintiff would have thirty years
13 in which to repay all sums due under the loan. Plaintiff has
14 performed all of the obligations under this home loan agreement
15 she was required to perform.

16 62. Within four years of the filing of this complaint, WMC
17 breached this home loan agreement by declaring the loan in
18 default, by demanding that plaintiff pay charges that were not
19 due under the loan, and by attempting to exercise foreclosure
20 rights given to WMC in the mortgage securing loan, even though
21 WMC did not have the right to exercise such foreclosure rights.

22 63. As a proximate result of WMC's breach of this home loan
23 agreement as alleged above, plaintiff has sustained compensatory
24 damages in an amount to be determined at time of trial,
25 including, without limitation, damages she sustained when she was
26 forced to seek bankruptcy court protection.

27 64. Wherefore, plaintiff seeks compensatory damages in such
28 amounts as may be allowed by the court at time of trial.

EIGHTH CAUSE OF ACTION

(Elder Abuse)

(This Cause of Action is Deleted)

NINTH CAUSE OF ACTION

(Usury Damages)

(Defendant WMC Only)

69. Plaintiff realleges and incorporates herein by reference the allegations set forth in Paragraphs 1 through 64 above as if fully alleged herein.

70. The interest rate charged by defendants for the WMC loan which is the subject of this complaint was usurious as that term is defined and applied by the California Constitution. This usury occurred within four years of the filing of this complaint. At the time this usury occurred, WMC was not a commercial lender as that term is used in the California Constitution, and WMC did not "arrange" for this loan as a licensed real estate broker.

71. Wherefore, plaintiff is entitled to such damages as the usury laws of California may allow.

TENTH CAUSE OF ACTION

(Rescission)

(Defendant WMC Only)

72. Plaintiff realleges and incorporates herein by reference the allegations set forth in Paragraphs 1 through 71 above as if fully alleged herein.

73. At the time in June 1997 when defendant WMC made to

1 plaintiff the home loan which is the subject of this complaint,
2 WMC implied in the loan documents that it presented to plaintiff
3 that WMC would service plaintiff's loan honestly and fairly and
4 accurately, using accurate accounting procedures, that it would
5 send to plaintiff accurate statements regarding loan payments,
6 loan balances, escrow charges, and other loan charges stated in
7 connection with defendant WMC's loan to plaintiff, and that it
8 would not force place hazard insurance unless there was clear and
9 convincing.

10 74. Said implied representations were false. In truth, as
11 part of its predatory lending practices defendant WMC intended to
12 misstate the amounts due under its loan to plaintiff in order to
13 obtain greater compensation under the loan than was permitted
14 either by the loan contract or by the various statutory consumer
15 protections that have been enacted to prevent predatory lending
16 practices and it was to force place hazard insurance even though
17 the evidence indicated that no such hazard insurance was needed.

18 75. Plaintiff relied upon the representations of defendant
19 WMC, as alleged above, and plaintiff's reliance was reasonable in
20 view of the fact that at the time of this loan WMC led plaintiff
21 to believe that WMC was a highly ethical and honest home loan
22 lender.

23 76. As a proximate result of said misrepresentations,
24 plaintiff has suffered substantial economic damages and emotional
25 distress and other general and special damages in an amount to be
26 proven at time of trial.

27 77. Wherefore, plaintiff seeks rescission of her loan
28 transaction with WMC Mortgage, including without limitation

1 cancellation of the loan and the rescission of the loan contract
2 and rescission of any other documents related to or made a part
3 of the loan contract, and she also seeks restitution of all
4 monies she has paid to WMC which under California or federal law
5 WMC was not entitled to receive.

6
7 ELEVENTH CAUSE OF ACTION

8 (Accounting)

9 (Defendants WMC and SPS Only)

10 78. Plaintiff realleges and incorporates herein by
11 reference the allegations set forth in paragraphs 1 through 77
12 above as if fully alleged herein.

13 79. Defendants WMC and/or SPS owe a balance to plaintiff on
14 plaintiff's loan account with defendants that can only be
15 ascertained by an accounting. The reason an accounting is
16 required is because the monetary damages that plaintiff seeks in
17 this complaint cannot be determined by calculation or by
18 reference to the allegations of the complaint.

19
20 TWELFTH CAUSE OF ACTION

21 (Breach of Fiduciary Duty)

22 (Defendant Cal Land Only)

23 80. Plaintiff realleges and incorporates herein by
24 reference the allegations set forth in paragraphs 1 through 79
25 above as if fully alleged herein.

26 81. At the time the home loan in question was placed in
27 June 1997, defendant Cal Land acted as the escrow, and as such
28 defendant Cal Land owed a fiduciary duty to both plaintiff and

1 defendant WMC.

2 82. Defendant Cal Land Title breached its fiduciary duty
3 by concealing and failing to disclose to plaintiff the mandated
4 written three-day right to cancel notice, and it also failed to
5 provide accurate disclosures, as mandated by TILA, Regulation Z,
6 and HOEPA.

7 83. As a proximate result of said breach of fiduciary duty,
8 plaintiff has suffered substantial economic damages and other
9 general and special damages in an amount to be proven at time of
10 trial, and she is entitled to rescission of her loan transaction
11 with WMC.

12 84. Wherefore, plaintiff seeks damages and whatever other
13 remedies are available under TILA, Regulation Z, and HOEPA,
14 including without limitation rescission of her loan transaction
15 with WMC.

16
17 THIRTEENTH CAUSE OF ACTION

18 (Negligence)

19 (Defendant Cal Land Only)

20 85. Plaintiff realleges and incorporates herein by
21 reference the allegations set forth in paragraphs 1 through 84
22 above as if fully alleged herein.

23 86. At the time the home loan in question was placed in
24 June 1997, defendant Cal Land acted as the escrow.

25 87. While acting as the escrow, defendant Cal Land Title
26 committed negligence by failing to providing to plaintiff the
27 mandated written three-day right to cancel notice, and it also
28 failed to provide accurate disclosures, as mandated by TILA,

1 Regulation Z, and HOEPA.

2 88. As a proximate result of said negligence, plaintiff has
3 suffered substantial economic damages and other general and
4 special damages in an amount to be proven at time of trial.

5 89. Wherefore, plaintiff seeks compensatory damages in an
6 amount according to plaintiff's proof at time of trial.

7

8

PUNITIVE DAMAGES

9 90. Plaintiff realleges and incorporates herein by reference
10 the allegations set forth in paragraphs 1 through 89 above as if
11 fully alleged herein.

12 91. As a proximate result of the statutory violations and
13 the concealment and the usury violations and the breach of
14 fiduciary duty alleged in this complaint, plaintiff is entitled
15 to an award of punitive damages pursuant to the provisions of
16 Civil Code §3294.

17

18

PRAYER

19 a. Plaintiff seeks both economic and non-economic
20 compensatory damages to the extent allowed by any of the causes
21 of action alleged in this complaint.

22 b. Plaintiff seeks statutory penalties to the extent allowed
23 by any of the causes of action alleged in this complaint.

24 c. Plaintiff seeks rescission and restitution and
25 disgorgement to the extent allowed by any of the causes of action
26 alleged in this complaint.

27 d. Plaintiff seeks usury damages to the extent allowed by
28 any of the causes of action alleged in this complaint.

1 e. Plaintiff seeks punitive damages to the extent allowed by
2 any of the causes of action alleged in this complaint.

3 f. Plaintiff seeks attorney's fees to the extent allowed by
4 any of the causes of action alleged in this complaint.

5 g. Plaintiff seeks costs of suit to the extent allowed by
6 any of the causes of action alleged in this complaint.

7 h. Plaintiff seeks such other and further relief that the
8 court may allow.

9
10
11 Date: March 15, 2005

/s/ John G. Warner
John G. Warner
Attorney for Plaintiff
Patricia C. Barbera

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EXHIBIT “D”

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3 55 Professional Center Parkway #H
4 San Rafael, CA 94903-2729
5 Telephone: (415) 472-6655

6 Attorney for Defendant
7 CALIFORNIA LAND TITLE OF MARIN
8
9
10
11

12 UNITED STATES DISTRICT COURT
13
14 NORTHERN DISTRICT OF CALIFORNIA
15
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12 Patricia C. Barbera,

13 Plaintiff,

14 v.

15 WMC Mortgage Corp., a California corporation;
16 WMC Finance Co.; Apollo Management L.P.;
17 WMCDirect; GE Consumer Finance, a unit of
18 General Electric Company; Fairbanks Capital
19 Corp., a Utah corporation; Fairbanks Capital
20 Holding Corp., a Delaware corporation;
21 California Land Title Company of Marin, a
22 California business entity; Does 1 through 100,
23 inclusive,

24 Defendants.
25
26

No. C 04 03738 SBA

DEFENDANT CALIFORNIA LAND
TITLE OF MARIN'S OPPOSITION TO
PLAINTIFF'S MOTION TO FILE
SECOND AMENDED COMPLAINT

Date: May 17, 2005

Time: 1:00 p.m.

Court: The Hon. Sandra B. Armstrong
Dept. 3

23 INTRODUCTION

24 Plaintiff seeks leave of Court to file a Second Amended Complaint after filing
25 her First Amended Complaint without leave of Court. Barbera acknowledges the filing
26

1 of her First Amended Complaint was improper as to California Land Title Company of
2 Marin (hereinafter "CLTC") since CLTC had previously filed an Answer to the original
3 Complaint. (Motion at p. 5-6.) CLTC contends that all claims asserted against it,
4 whether in the form of the original Complaint, the First Amended Complaint, or the
5 proposed Second Amended Complaint are a sham and without factual or legal
6 justification. Further, Barbera's amendments are futile because her allegations against
7 CLTC — which took place nearly eight years ago on June 12, 1997 — are barred by the
8 statute of limitations.
9

11 **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

12 CLTC is an underwritten title company with offices in Marin County, California.
13 The business operations of CLTC consist of issuance of title insurance policies and
14 provision of escrow services for real estate transactions. The present litigation involves
15 an escrow closed by CLTC for the Barbera/WMC transaction on June 12, 1997. As
16 noted in previous pleadings filed herein, Barbera filed a complaint in San Francisco
17 Superior Court on June 11, 2001 against Defendants other than CLTC ("*Barbera I*").
18 This separate pending case is currently awaiting trial. A copy of the Complaint filed in
19 *Barbera I* was judicially noticed in the present action by the WMC Defendants and
20 attached as an exhibit to the WMC Defendants' Motion to Dismiss. In paragraph 26(c)
21 of the Complaint in *Barbera I*, at page 6, lines 18-22, Barbera alleged:

22 "At the close of the transaction, the title company failed to provide
23 Plaintiff with a copy of the Disclosure Statement and provided her with a
24 single copy of the Notice of the Right to Cancel. Plaintiff was not given
25 copies of any documents in which appeared material terms and conditions
26 of the loan, including but not limited to the unconscionable loan
origination fee, until after the loan transaction was consummated."

1
2 On July 23, 2004, Plaintiff filed her original Complaint in the present action in
3 San Francisco Superior Court after her Motion to Amend the Complaint and add new
4 parties in *Barbera I* was denied. A Notice of Removal of the Action was filed in this
5 Court on September 3, 2004. CLTC filed its Answer on January 7, 2005. On January
6 14, 2005, CLTC joined in the WMC Defendants' Motion to Dismiss. Plaintiff filed her
7 First Amended Complaint in the present action without prior leave of Court on March
8 15, 2005 and on April 12, 2005 filed the pending Motion for Leave of Court to file a
9 Second Amended Complaint.

10 The proposed Second Amended Complaint contains three causes of action
11 against CLTC. The Third Cause of Action claims damages resulting from an alleged
12 violation of the Truth in Lending Act ("TILA"), Regulation Z and The Homeowners'
13 Equity Protection Act of 1994 ("HOEPA"). The Twelfth Cause of Action claims
14 damages for an alleged breach of fiduciary duty, and the Thirteenth Cause of Action
15 claims damages for alleged escrow negligence. For both the Twelfth and Thirteenth
16 Causes of Actions, the alleged wrongful conduct by CLTC consists of "concealing and
17 failing to disclose to plaintiff the mandated written three-day right to cancel notice" and
18 "fail[ing] to provide accurate disclosures, as mandated by TILA, Regulation Z and
19 HOEPA." (Proposed Second Amended Complaint, ¶¶ 82, 87.)
20
21

22 ARGUMENT

23 A. STANDARD FOR LEAVE TO AMEND

24 In considering a Motion to Amend the Pleadings, the Court may consider
25 undue delay, prejudice to the opposing party, futility of the amendment, bad faith
26

1 and whether the party has previously amended its pleadings. Futility alone can
2 justify denial of leave to amend. Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir.
3 1995). See also Foman v. Davis, 371 U.S. 178, 182 (1962) (establishing futility as
4 grounds to deny motion to amend); Funtanilla v. Rubles, No. C99-5425, 2003 U.S.
5 Dist. LEXIS 9313, at *19 (N.D. Cal. June 3, 2003) (denying motion to amend
6 because an attempt to bring time-barred claims against new defendants would be
7 futile).

8
9
10 **B. BARBERA FAILS TO STATE FACTS SUFFICIENT TO**
11 **CONSTITUTE A CLAIM AGAINST CLTC.**

12 **1. The Duty of an Escrow Agent**

13 Admittedly, an escrow holder is an agent and fiduciary of the parties to the
14 escrow. However, the agency created by the escrow is limited to the obligation of the
15 escrow holder to carry out the instructions of each of the parties to the escrow. Vournas
16 v. Fidelity Nat. Tit. Ins. Co., 73 Cal. App. 4th 668, 674 (1999). In defining the scope of
17 the escrow's fiduciary duties, the general principle is that the escrow holder must
18 comply strictly with the instructions of the parties. Amen v. Merced County Title Co.,
19 58 Cal. 2d 28, 534 (1962). Beyond the faithful compliance by the escrow with its
20 principals' instructions, the escrow holder has no general duty to police the affairs of its
21 principals. Claussen v. First American Title Guaranty Co., 186 Cal. App. 3d 429, 435-
22 436 (1986). Stated another way, absent clear evidence of fraud, an escrow's obligations
23 are limited to compliance with the parties' instructions. Lee v. Title Ins. & Trust Co.,
24 264 Cal. App. 2d 160, 162 (1968). The escrow owes no general duty of disclosure to its
25 principal(s). Cunningham v. Security Title Ins. Co., 241 Cal.App.2d 626, 630-631
26 (1966). The escrow has no obligation to provide advice regarding the business

propriety of the transaction. Axley v. Transamerica Title Ins. Co., 88 Cal.App.3d 1, 9-10 (1978). The provisions of the TILA, Regulation Z or HOEPA do not enlarge or modify the basic duties of the escrow holder.

2. Barbera Fails to Allege Facts to Establish Any Legal Duty of CLTA Pursuant to TILA, Regulation Z and HOEPA

Barbera alleges that escrow closed on June 12, 1997 (Proposed Second Amended Complaint, ¶ 14.) She makes no allegations of wrongful or participatory conduct by CLTC from and after this date. She makes no allegations that CLTC violated oral or written instructions provided by Barbera during the course of the escrow. She makes no allegations that CLTC violated any law or regulation that imposes specific duties upon an escrow holder. She makes no specific factual allegations of concerted activity with the other Defendants. A general allegation of concerted action has no pleading value or legal consequence. If a plaintiff elects to sue on the theory of conspiracy, the complaint should allege (a) the formation and operation of the conspiracy, (b) the wrongful act(s) of any of the conspirators pursuant to the conspiracy and (c) the resulting damage. Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 488 (1941); Sales Corp. v. Olsen, 80 Cal.App.3d 645, 649 (1978). The Complaint fails to allege facts to establish any legal duty of an escrow pursuant to TILA, Regulation Z or HOEPA, assuming such a legal duty might exist. Plaintiff's pleadings falsely imply that the TILA, Regulation Z and HOEPA are independent of each other. In fact, Regulation Z and HOEPA are integrated with the TILA, which provides the enforcement standard and penalty parameters for violation. CLTC cannot be legally liable under the TILA, Regulation Z or HOEPA since CLTC is not a "creditor" under the TILA or HOEPA [see 15 U.S.C. §1602(f)] or a "business which offers or extends credit" under Regulation Z [see 12 CFR §226.1(c)]. Stated another way, the TILA and HOEPA impose legal liability only

1 upon "creditors" or "lessors" as defined therein, and Regulation Z only applies to
2 individuals or businesses that offer or extend credit under the four conditions described
3 in 12 CFR §226.1(c). Barbera has failed to state facts sufficient to constitute a claim
4 against CLTC under the TILA, Regulation Z or HOEPA. Because these amendments
5 are futile, Barbera should accordingly be denied leave to amend.
6

7 **3. The Statute of Limitations Bars Barbera's Claims Against CLTC.**

8 Under California law, the statute of limitations for escrow liability may range
9 from two to four years, depending upon the theory of recovery. For an action based
10 upon an alleged breach of oral instructions, the statute of limitations is two years
11 pursuant to California Code of Civil Procedure section 339. The statute of limitations
12 for breach of fiduciary duty is either three or four years as the result of conflicting case
13 law. See California Code of Civil Procedure § 338(b) (utilizing three years); Kruse v.
14 Miller, 143 Cal. App. 2d 656, 660 (1956) (utilizing three years); Hecht v. Harris,
15 Upham & Co., 430 F.2d 1202, 1210 (9th Cir. 1970) (utilizing three years); Stallberg v.
16 Western Title Ins. Co., 230 Cal. App. 3d 1223, 1230 (1991) (utilizing four years and
17 applying California Code of Civil Procedure § 343). For breach of a written escrow
18 instruction, the statute of limitations is four years. Amen v. Merced Co. Title Co., 58
19 Cal. 2d 528, 534 (1962).

20 Barbera's claims against CLTC are based on incidents that took place on June
21 12, 1997 — over seven years before she filed the original Complaint on July 23, 2004
22 — and such claims are barred by the statute of limitations, absent a detailed factual
23 pleading of facts that would invoke the delayed discovery rule. Prudential Home
24 Mortgage Co. v. Superior Court, 66 Cal.App. 4th 1236, 1246-1247; McKelvey v. Boeing
25 North American, Inc., 74 Cal.App. 4th 151, 160-161. The proposed pleading lacks the
26

1 required specificity and essential substance. This conclusion is clear and obvious from
2 the face of the proposed Second Amended Complaint. Barbera alleges:

3
4 "Plaintiff did not discover her causes of action against Defendants SPS
5 and CAL LAND until approximately ten months ago when Defendant
6 WMC produced documents that Plaintiff had been requesting for nearly a
7 year pursuant to written discovery that Plaintiff propounded in a pending
8 state court case. These documents show that SPS's predecessor,
Fairbanks, subsequent to loan origination became servicer for Plaintiff's
loan and that CAL LAND had improperly processed escrow documents
required for the loan that Plaintiff had obtained from WMC."

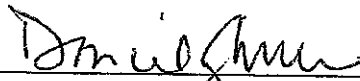
9 (Proposed Second Amended Complaint, ¶ 10.) This effort to invoke the delayed
10 discovery rule belies the factual allegations of paragraph 26(c) of the Complaint
11 filed in *Barbera I* on June 11, 2001 and is an obvious effort to mislead (deceive)
12 this Court. Such conduct should not be permitted. Moreover, even Barbera's
13 vague reference to unspecified documents suggesting CLTC engaged in some
14 equally vague improper escrow processing does not salvage her claims. There
15 are no allegations that CLTC even intentionally or otherwise withheld documents
16 or information forming the predicates of her claims against CLTC. In addition
17 there are no facts alleged excusing Barbera from timely prosecuting TILA claims
18 about disclosures she alleges should have been, but were not, provided to her in
19 June 1997. The factual predicates of those allegations — what documents she
20 supposedly did and did not receive — were obviously known to her almost eight
21 years ago, and she offers no allegations (nor could she) that permit her to avoid
22 that fact.

23 As her claims against CLTC are barred by the statute of limitations, it would be
24 futile to allow Barbera to amend her stale claims against CLTC.
25
26

1
2
3 **CONCLUSION**

4 As to CLTC, the original complaint and each subsequent version is a sham. The
5 only factual basis for the claimed liability is the alleged violation of the TILA,
6 Regulation Z and/or HOEPA. As noted above, these statutes and regulations impose no
7 duties or liability upon CLTC in its capacity as an escrow service provider.
8 Notwithstanding this fundamental flaw, all alleged claims against CLTC are also time-
9 barred. For the foregoing reasons, CLTC respectfully requests that Plaintiff's Motion
10 for Leave of Court to file the proposed Second Amended Complaint be denied as being
11 futile as a matter of fact and law.

12 Dated: April 26, 2005

13 
14 _____
15 DANIEL A. GAMER
16 Attorney for Defendant
17 California Land Title of Marin
18

19 I, Daniel A. Gamer, am the ECF User whose ID and password are being used to
20 file this Opposition to Plaintiff's Motion for Leave to File a Second Amended
21 Complaint.

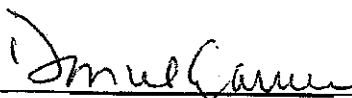
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23 _____
24 Daniel A. Gamer
25
26

TABLE OF CONTENTS

	<u>Page No.</u>
INTRODUCTION	1
FACTUAL BACKGROUND AND PROCEDURAL HISTORY	2
ARGUMENT	3
A. STANDARD FOR LEAVE TO AMEND	3
B. BARBERA FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CLAIM AGAINST CLTC	4
1. The Duty of an Escrow Agent	4
2. Barbera Fails to Allege Facts to Establish Any Legal Duty of CLTC Pursuant to TILA, Regulation Z and HOEPA	5
3. The Statute of Limitations Bars Barbera's Claims Against CLTC	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES

Page No.

<u>Amen v. Merced County Title Co.</u> , 58 Cal.2d 528 (1962)	4, 6
<u>Axley v. Transamerica Title Ins. Co.</u> , 88 Cal.App.3d 1 (1988)	5
<u>Bonin v. Calderon</u> , 59 F.3d 815 (9 th Cir. 1995)	4
<u>Claussen v. First American Title Guaranty Co.</u> , 186 Cal.App.3d 429 (1986)	4
<u>Cunningham v. Security Title Ins. Co.</u> , 241 Cal.App.2d 626 (1966)	4
<u>Foman v. Davis</u> , 371 U.S. 178 (1962)	4
<u>Funtanilla v. Rubles</u> , No. C99-5425, TEH2003 U.S. Dist. LEXIS 9313 (N.D. Cal. June 3, 2003)	4
<u>Hecht v. Harris, Upham & Co.</u> , 430 F.2d 1202 (9 th Cir. 1970)	6
<u>Kruse v. Miller</u> , 143 Cal.App.2d 656 (1956)	6
<u>Lee v. Title Ins. & Trust Co.</u> , 264 Cal.App.2d 160 (1968)	4
<u>McKelvey v. Boeing North American, Inc.</u> , 74 Cal.App. 4 th 151 (1999)	6
<u>Orloff v. Metropolitan Trust Co.</u> , 17 Cal.2d 484 (1941)	5
<u>Prudential Home Mortgage Co. v. Superior Court</u> , 66 Cal.App.4 th 1236 (1998)	6
<u>Sales Corp. v. Olsen</u> , 80 Cal.App.3d 645 (1978)	5
<u>Stallberg v. Western Title Ins. Co.</u> , 230 Cal.App.3d 1223 (1991)	6
<u>Vournas v. Fidelity Nat. Tit. Ins. Co.</u> , 73 Cal.App.4 th 668 (1999)	4

<u>STATUTES</u>	<u>Page No.</u>
12 CFR 226.1(c)	5-6
15 U.S.C. §1602(f)	5
Homeowners Equity Protection Act of 1994	3-7
Truth in Lending Act	3-7
Regulation Z	3-7
California Code of Civil Procedure §338(b)	6
California Code of Civil Procedure §339	6
California Code of Civil Procedure §343	6

EXHIBIT “E”

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6
7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
9

10 PATRICIA BARBERA,

No. C 04-3738 SBA

11 Plaintiff,

ORDER

12 v.

13 WMC MORTGAGE CORP., et al.,

14 Defendants.
15

16 This matter comes before the Court on Plaintiff Patricia Barbera's Motion for Leave to Amend and
17 Defendants Fairbanks Capital Corporation and Fairbanks Capital Holding Corporation's (collectively
18 "Fairbanks") Motion for Entry of Final Judgment pursuant to Fed. R. Civ. P. 54.

19 Having read and considered the arguments presented by the parties in their moving papers, the Court finds
20 this matter appropriate for disposition without a hearing. The Court HEREBY DENIES Plaintiff's Motion
21 to Amend and GRANTS Fairbanks' Motion for Entry of Final Judgment.

22 **BACKGROUND**

23 On September 3, 2004, this action was removed from San Francisco Superior Court. Plaintiff filed
24 the instant lawsuit alleging improper and illegal conduct by Defendants in the "manner in which they handle
25 mortgage loans on residential property in California." (Complaint, ¶ 1.) On January 7, 2005, after several
26 stipulated extensions of time to respond to the Complaint, Defendant California Land Title of Marin ("Cal
27 Land") filed an Answer to the Complaint.

28 On January 10, 2005, Fairbanks filed a Motion for Summary Judgment, in which it claimed that

1 Plaintiff's suit was barred under the principles of res judicata and release because Plaintiff was a member of
2 a nationwide class action, which challenged the same conduct, and was subsequently settled. Plaintiff did
3 not dispute that she was a member of the prior class action against Fairbanks, which involved identical
4 claims, and ended in a final judgment on the merits. Instead, Plaintiff claimed she was not bound by the
5 prior judgment or release because she did not receive actual notice of the settlement. Defendants WMC
6 Mortgage, WMC Finance, and WMC Direct ("WMC") sought to join in Fairbanks' Motion for Summary
7 Judgment.¹

8 On March 7, 2005, the Court granted Fairbanks' Motion for Summary Judgment, finding that
9 Plaintiff's claims against Fairbanks were barred by the doctrines of res judicata and release. [Docket No.
10 71.] The Court, however, denied WMC's request to join in Fairbanks' motion because the parties were
11 not similarly situated. On March 15, 2005, Plaintiff filed a First Amended Complaint ("FAC"). The FAC
12 includes additional allegations against Defendant WMC, an additional cause of action for an accounting
13 against WMC and Fairbanks, names Cal Land in the third cause of action for violations of, inter alia, the
14 Truth in Lending Act, and adds two additional causes of action against Cal Land for breach of fiduciary
15 duty and negligence.² On March 21, 2005, Fairbanks filed a Motion for Entry of Final Judgment pursuant
16 to Fed. R. Civ. P. 54, and noticed the Motion for hearing on April 26, 2005. On April 12, 2005, one-
17 week after the deadline for filing an Opposition, Plaintiff filed her Opposition to Fairbanks' Motion for
18 Entry of Final Judgment. The Opposition asserts that entry of final judgment is inappropriate because of
19 Plaintiff's March 15, 2005 filing of the FAC. On April 18, 2005, Fairbanks filed a reply.

20 Also on April 12, 2005, Plaintiff filed a Motion for Leave to Amend the FAC, and attached a
21 proposed Second Amended Complaint ("SAC"). In her Request for Leave to Amend the FAC, Plaintiff
22

23 ¹Also on January 10, 2005, WMC filed a Motion to Dismiss. On February 2, 2005, Plaintiff
24 moved to continue both the hearing on WMC's Motion to Dismiss and Fairbanks' Motion for Summary
25 Judgment. On February 4, 2005, Defendants filed a consolidated response to Plaintiff's request in which
26 they asserted that they were willing to accommodate Plaintiff's request to continue the Motion to Dismiss,
but not the hearing on the Motion for Summary Judgment. After considering the arguments presented by
the parties, the Court granted Plaintiff's request to continue the hearing on WMC's Motion to Dismiss and
denied Plaintiff's request to continue the hearing on Fairbanks' Motion for Summary Judgment.

27 ²The FAC also names Select Portfolio Servicing, Inc. ("SPS") as a defendant, and suggests that
28 this is the new name of Fairbanks Capital Corp. (FAC, ¶ 5.) Fairbanks, however, does not call itself SPS
in its papers.

1 seeks to add allegations against Fairbanks. The new allegations assert, in conclusory fashion, that
 2 Fairbanks' violations of the Consumer Legal Remedies Act, Real Estate Settlement Procedures Act and
 3 Debt Collections Practices Act each occurred subsequent to December 10, 2003. (SAC, ¶¶ 37, 46, &
 4 51.)³ On April 26, 2005, Cal Land filed an Opposition to Plaintiff's Motion for Leave to Amend, asserting
 5 that the FAC was improperly filed without leave to amend because Cal Land had answered. Cal Land also
 6 argued that Plaintiff's request for leave to file both the FAC and the SAC should be denied.

7 I. Leave to Amend

8 A. Legal Standard

9 According to Federal Rule of Civil Procedure 15(a):

10
 11 [a] party may amend the party's pleading once as a matter of course at any time before a
 12 responsive pleading is served or, if the pleading is one to which no responsive pleading is
 13 permitted and the action has not been placed upon the trial calendar, the party may so
 14 amend it at any time within 20 days after it is served. Otherwise a party may amend the
 party's pleading only by leave of court or by written consent of the adverse party; and leave
 shall be freely given when justice so requires.

15 Leave to amend a complaint "should be granted unless the court determines that the allegation of other facts
 16 consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distrib. Co. v.
 17 Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986). The Court can consider factors such as
 18 "the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by
 19 previous amendments, undue prejudice to the opposing party and futility of the proposed amendment."
 20 Moore v. Kayport Package Express, 885 F.2d 531, 538 (9th Cir. 1989). Leave to amend is properly
 21 denied "where the amendment would be futile." DeSoto v. Yellow Freight Sys., 957 F.2d 655, 658 (9th
 22 Cir. 1992). "Futility of amendment can, by itself, justify the denial of a motion for leave to amend." Bonin
 23 v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995).

24 B. Discussion

25 1. First Amended Complaint

26
 27
 28 ³The SAC also includes a general allegation that Plaintiff "seeks remedies for harm caused by
 [Fairbanks] subsequent to December 10, 2003." (SAC, ¶ 5.)

Plaintiff filed the FAC on March 15, 2005. Plaintiff did not seek leave to amend the Complaint.⁴ The FAC added allegations against Fairbanks, WMC, and Cal Land. Ordinarily, a plaintiff may amend his or her complaint once, as of right, any time prior to the filing of responsive pleadings. Fed. R. Civ. P. 15(a). A plaintiff can amend claims once as a matter of right against a defendant who has not filed a responsive pleading, even if other defendants have filed a responsive pleading. Barksdale v. King, 699 F.2d 744, 747 (5th Cir. 1983). A motion to dismiss a complaint is not a responsive pleading. Miles v. Dep't of Army, 881 F.2d 777, 781 (9th Cir. 1989).

a. WMC

WMC filed a motion to dismiss prior to the filing of the FAC, but did not file an answer.⁵ Thus, it is clear that Defendant WMC did not file a responsive pleading prior to the filing of the FAC. Accordingly, Plaintiff's amendments to claims against WMC were appropriately made as a matter of right.

b. Fairbanks

"A litigant cannot amend as a matter of right under Rule 15(a) after a summary judgment has been rendered." Wright & Miller, Federal Practice and Procedure, § 2712; McDonald v. Hall, 579 F.2d 120, 121 (1st Cir. 1978); Clardy v. Duke University, 299 F.2d 368, 370 (4th Cir. 1962). Thus, while no leave to amend may have been required to amend claims against WMC, leave was required to amend claims against Fairbanks.⁶ Accordingly, the Court next evaluates whether Plaintiff should be granted leave to amend claims made against Fairbanks.

The only substantive allegations added in the FAC against Fairbanks relate to a new cause of action

⁴As discussed supra, Plaintiff seeks leave to amend the FAC, not the Complaint. However, in her motion for leave to amend the FAC, Plaintiff addresses her failure to seek leave to amend the Complaint. Plaintiff asserts that no leave was required to file the FAC against WMC and Fairbanks, but acknowledges that leave was required to amend claims against Cal Land. (Motion for Leave, 5-6.)

⁵On March 23, 2005, the Court denied WMC's Motion to Dismiss as moot. [Docket No. 82].

⁶In her Motion for Leave, Plaintiff does not cite cases to the contrary. Instead, she cites cases holding that a complaint can be amended as of right following the granting of a motion to *dismiss*. (Motion for Leave, 3-4.) The only case she cites relating to summary judgment is one in which the Ninth Circuit determined that a district court could simply strike a motion for leave to amend where summary judgment had been granted and entered, and that amendment as a matter of right was also unavailable under those circumstances. (*Id.* (citing Lindauer v. Rogers, 91 F.3d 1355, 1357 (9th Cir. 1996).) Lindauer does not hold that a plaintiff may amend as of right against a party who has obtained summary judgment of all claims made against it.

1 for an accounting. However, a cause of action against Fairbanks for an accounting is meaningless in light of
2 the fact that the Court has granted summary judgment in Fairbanks' favor as to the underlying substantive
3 claims. In the March 7, 2005 Order, the Court found that the settlement in a previous class action barred
4 Plaintiff's claims against Fairbanks under the doctrines of res judicata and release. (March 7, 2005 Order
5 at 7-10.) The Court has already granted Fairbanks summary judgment on the causes of action for which
6 Plaintiff seeks an accounting of damages. Accordingly, because leave to amend claims against Fairbanks is
7 required, and because granting leave in this instance would be futile, the Court strikes the additional
8 allegations made against Fairbanks in the FAC. Bonin, 59 F.3d at 845.

9
10 **c. Cal Land**

11 Cal Land filed an answer to the Complaint on January 7, 2005. Thus, Plaintiff must be granted
12 leave in order to amend claims made against Cal Land.

13 The FAC adds Cal Land as a named defendant to the Third Cause of Action for violation of the
14 Truth in Lending Act ("TILA"), Home Ownership and Equity Protection Act ("HOEPA"), and Regulation
15 Z, and adds two additional causes of action against Cal Land for breach of fiduciary duty and negligence.
16 In each of the three causes of action, Plaintiff asserts that Cal Land failed to provide to her a mandated
17 written three-day right to cancel notice and failed to provide "accurate disclosures." (FAC ¶¶ 42, 82, &
18 87.)

19 Cal Land asserts that the FAC was filed in error and leave to file it should be denied. Cal Land
20 asserts that amendment would be futile because an escrow holder cannot be liable for violation of the
21 provisions of the Truth in Lending Act, HOEPA, and Regulation Z that Plaintiff relies upon. (Opp. to
22 Motion for Leave, 4.) Cal Land also asserts that although it owes a fiduciary duty to the parties involved in
23 an escrow, such duties are limited. (Id.)

24 An escrow holder, as a dual agent of the parties to the escrow, owes duties to the parties
25 to the escrow. However, those duties are limited. [] The primary duty owed by an escrow
26 holder is to strictly and faithfully perform the instructions given to it by the parties to the
27 escrow.

28 Vournas v. Fidelity Nat. Tit. Ins. Co., 73 Cal. App. 4th 668, 674 (1999)). "An escrow holder has no
general duty to police the affairs of its depositors, however. [] An escrow holder's agency is limited to

1 faithful compliance with instructions.” Claussen v. First American Title Guaranty Co., 186 Cal. App. 3d
2 429, 435-436 (1986).

3 In the FAC, Plaintiff for the first time names Cal Land in the third cause of action for violations of
4 TILA, HOEPA, and Regulation Z. (FAC, ¶ 43.) First, these provisions apply to creditors or those who
5 “offer and extend credit,” not to escrow holders. 15 U.S.C. § 1635(a), the provision of TILA that Plaintiff
6 relies upon, states that:

7 Disclosure of obligor's right to rescind. Except as otherwise provided in this section, in the
8 case of any consumer credit transaction (including opening or increasing the credit limit for
9 an open end credit plan) in which a security interest, including any such interest arising by
10 operation of law, is or will be retained or acquired in any property which is used as the
11 principal dwelling of the person to whom credit is extended, the obligor shall have the right
12 to rescind the transaction until midnight of the third business day following the
13 consummation of the transaction or the delivery of the information and rescission forms
14 required under this section together with a statement containing the material disclosures
15 required under this title [15 USCS §§ 1601 et seq.], whichever is later, by notifying the
16 creditor, in accordance with regulations of the Board, of his intention to do so. ***The***
17 ***creditor shall clearly and conspicuously disclose***, in accordance with regulations of the
18 Board, to any obligor in a transaction subject to this section the rights of the obligor under
19 this section. ***The creditor shall also provide, in accordance with regulations of the***
20 ***Board, appropriate forms for the obligor to exercise his right to rescind any***
21 ***transaction subject to this section.***

15 15 U.S.C. § 1635(a) (emphasis added). 15 U.S.C. § 1639, the provision of HOEPA that Plaintiff relies
16 upon, states:

17 Specific disclosures. In addition to other disclosures required under this title [15 USCS §§
18 1601 et seq.], for each mortgage referred to in section 103(aa) [15 USCS § 1602(aa)],
19 ***the creditor shall provide the following disclosures*** in conspicuous type size . . .

20 15 U.S.C. § 1639(a)(1) (emphasis added.) Finally, Regulation Z requires a “business which offers or
21 extends credit” to make certain disclosures:

22 Purpose. The purpose of this regulation is to promote the informed use of consumer credit
23 by requiring disclosures about its terms and cost. The regulation also gives consumers the
24 right to cancel certain credit transactions that involve a lien on a consumer's principal
25 dwelling, regulates certain credit card practices, and provides a means for fair and timely
26 resolution of credit billing disputes. The regulation does not govern charges for consumer
27 credit. The regulation requires a maximum interest rate to be stated in variable-rate
28 contracts secured by the consumer's dwelling. It also imposes limitations on home equity
plans that are subject to the requirements of § 226.5b and mortgages that are subject to the
requirements of § 226.32. The regulation prohibits certain acts or practices in connection
with credit secured by a consumer's principal dwelling.

(c) Coverage. (1) In general, ***this regulation applies to each individual or business***

1 *that offers or extends credit* when four conditions are met: (I) The credit is offered or
 2 extended to consumers; (ii) the offering or extension of credit is done regularly; n1 (iii) the
 3 credit is subject to a finance charge or is payable by a written agreement in more than 4
 installments; and (iv) the credit is primarily for personal, family, or household purposes.

4 12 C.F.R. § 226.1(b) & (c) (emphasis added). While Cal Land specifically identifies these provisions and
 5 their inapplicability to Cal Land, Plaintiff makes no attempt in Reply to respond to Cal Land's argument that
 6 these provisions do not apply to an escrow holder. Instead she states that Cal Land was acting as a
 7 fiduciary of WMC and therefore that it should have delivered certain documents to Plaintiff. (Reply to
 8 Motion for Leave, 4.) However, the FAC fails to allege that Cal Land breached any fiduciary duty it
 9 owed to Plaintiff. It does not allege that WMC provided these documents to Cal Land and instructed Cal
 10 Land to deliver the documents, or any other "disclosures," to Plaintiff. Thus, Plaintiff's proposed
 11 amendments to the FAC against Cal Land fail because: (1) TILA, HOEPA, and Regulation Z do not apply
 12 to an escrow holder; and (2) the duties of the escrow are limited to faithfully carrying out the instructions of
 13 the principals and there are no allegations that Cal Land was instructed by WMC to provide any
 14 documents or to make any disclosures to Plaintiff.

15 In addition, Cal Land asserts that Plaintiff's claims are barred by the statute of limitations. (Opp. to
 16 Motion for Leave, 6.) Under California law, the statute of limitations for escrow liability ranges from two to
 17 four years, depending on the theory of recovery. For an action based on a breach of oral instructions, the
 18 statute of limitations is two years. Cal. Code Civ. Proc. § 339. For breach of a written escrow instruction,
 19 the statute of limitations is four years. Amen v. Merced Title County Title Co., 58 Cal.2d 528, 534
 20 (1962). "The statute of limitations for breach of fiduciary duty is four years." Stallberg v. Western Title
 21 Ins. Co., 230 Cal. App. 3d 1223, 1230 (1991) (citing California Civil Code § 343).

22 Here, the conduct alleged against Cal Land occurred in June 1997. (FAC, ¶ 42.) Plaintiff's FAC
 23 was filed on March 15, 2005, nearly eight years after the relevant conduct occurred. In Reply, Plaintiff
 24 asserts that the statute of limitations should be tolled because Plaintiff did not discover Cal Land's alleged
 25 misconduct until "some ten months prior to the filing of this case in state court." (Reply to Motion for
 26 Leave, 5.)⁷ Plaintiff's FAC asserts:

27 _____
 28 ⁷Plaintiff's state court action was filed on July 23, 2004, and removed on September 3, 2004. Ten
 months before July 2004 is September 2003.

1 Plaintiff did not discover her causes of action against defendants Fairbanks Capital Corp.,
 2 Fairbanks Capital Holding Corp., and California Land Title Company until approximately
 3 ten months ago when defendant WMC produced documents that plaintiff had been
 4 requesting for nearly a year pursuant to written discovery.⁸ These documents show that the
 5 Fairbanks defendants subsequently became the servicer for plaintiff's loan and that
 6 California Land Title Company of Marin had improperly processed escrow documents
 7 required for a loan that plaintiff had obtained from WMC.

8 (FAC, ¶ 10.) "[T]he doctrine of delayed discovery requires a plaintiff to plead facts showing an excuse for
 9 late discovery of the facts underlying his cause of action. He must show that [he] was not at fault for failing
 10 to discover it or had no actual or presumptive knowledge of facts sufficient to put him on inquiry."

11 Prudential Home Mortgage Co. v. Superior Court, 66 Cal. App. 4th 1236, 1247 (1998) (internal
 12 quotation omitted). Here, Plaintiff's FAC fails to plead such facts. As a preliminary matter, the factual
 13 predicate for Cal Land's failure to provide her with certain documents should have been known to her in
 14 1997 without the need for discovery – she should have known what she did or did not receive in June 1997
 15 well before September 2003. Moreover, Paragraph 10 fails to make clear what facts were discovered by
 16 Plaintiff that made her aware of her claims against Cal Land. Plaintiff's reference to "improperly processed
 17 escrow documents" fails to put Cal Land on notice of what documents were improperly processed, or what
 18 was improper about such processing. In Reply, Plaintiff asserts that "Cal Land had improperly processed
 19 escrow documents, particularly the right to rescind notice." (Reply to Motion for Leave, 5.) To the extent
 20 Plaintiff asserts that the "improper processing" was the failure to provide the right to rescind notice, Plaintiff
 21 should have been aware of this failure long before. Moreover, as discussed supra, there are no factual
 22 allegations suggesting that Cal Land breached any duty to provide Plaintiff with the right to rescind notice.
 23 Accordingly, because leave to amend claims against Cal Land is required, and because granting leave in
 24 this instance would be futile, the Court strikes the additional allegations made against Cal Land in the FAC.
 25 Bonin, 59 F.3d at 845.

26 2. Proposed Second Amended Complaint

27 In her Request for Leave to Amend the FAC, Plaintiff seeks to add allegations against Fairbanks.
 28 The new allegations assert, in conclusory fashion, that Fairbanks' violation of the Consumer Legal

⁸Although not entirely clear, it appears that this discovery related to an earlier action between Plaintiff and WMC.

1 Remedies Act, Real Estate Settlement Procedures Act and Debt Collections Practices Act, each occurred
2 subsequent to December 10, 2003. (SAC, ¶¶ 37, 46, & 51.) However, Plaintiff does not allege any facts
3 whatsoever in support of these assertions – Plaintiff fails to describe any acts committed by Fairbanks that
4 occurred subsequent to December 10, 2003.⁹ Accordingly, Plaintiff's proposed amendments to the FAC
5 are futile, and leave to amend is denied.

6 **C. Conclusion**

7 For the foregoing reasons, the Court strikes those portions of the FAC that add allegations against
8 Fairbanks and Cal Land, and denies Plaintiff's Motion for Leave to amend the FAC.

9 **II. Fairbanks' Motion for Entry of Final Judgment**

10 **A. Legal Standard**

11 Fed. R. Civ. P. 54(b) allows the district court to sever a final judgment with respect to particular
12 claims (or parties) for an immediate appeal. James v. Price Stern Sloan, 283 F.3d 1064, 1066, n.4 (9th
13 Cir. 2002). Rule 54(b) states:

14
15 (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one
16 claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or
17 third-party claim, or when multiple parties are involved, the court may direct the entry of a
18 final judgment as to one or more but fewer than all of the claims or parties only upon an
19 express determination that there is no just reason for delay and upon an express direction
20 for the entry of judgment. In the absence of such determination and direction, any order or
21 other form of decision, however designated, which adjudicates fewer than all the claims or
22 the rights and liabilities of fewer than all the parties shall not terminate the action as to any of
23 the claims or parties, and the order or other form of decision is subject to revision at any
24 time before the entry of judgment adjudicating all the claims and the rights and liabilities of
25 all the parties.

26 Thus, in order for Rule 54(b) to apply, there must either be multiple claims or multiple parties involved.
27 Fed. R. Civ. P. 54(b). In addition, the court must determine whether there is a "final judgment" that can be
28 entered. See Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 7 (1980). For purposes of Rule

26 ⁹To the extent that Plaintiff asserts that her harm merely continued subsequent to December 10,
27 2003 for acts that occurred prior to that time (Declaration of John G. Warner in Support of Motion for
28 Leave to Amend, ¶ 5), this too is barred by the doctrine of release. While acts or omissions by Fairbanks
subsequent to December 10, 2003 were not barred by the previous settlement, harms resulting from
conduct that occurred between January 1, 1999 and December 10, 2003 are barred. (See Curry
Settlement Agreement, ¶¶ 9, 13-14 & 30; March 7, 2005 Order at 5, n. 4.)

54(b), a final judgment is one that disposes of at least one claim in a multi-claim action or at least one party in a multi-party action. See Continental Airlines, Inc., 819 F.2d at 1524; Credit Francais Int'l, S.A. v. Bio-Vita, Ltd., 78 F.3d 698, 706 (1st Cir. 1996); (citing Wright & Miller, Federal Practice and Procedure, § 2656).

Once the district court determines that there is a final judgment, the Court next determines whether there is any just reason for delay. Curtis-Wright Corp., 446 U.S. at 8. In deciding whether there are no just reasons to delay the appeal of individual final judgments, a district court "must take into account judicial administrative interests as well as the equities involved." Id., (internal quotation omitted). at 797-98 (internal quotation omitted). This determination by the district court is granted deference because "it is the one most likely to be familiar with the case and with any justifiable reasons for delay." Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 797 (9th Cir. 1991) (quotations omitted).

B. Discussion

1. Timeliness of Plaintiff's Opposition

Fairbanks asserts that Plaintiff's Opposition to its Motion for Entry of Final Judgment was untimely and should be stricken. (See Motion for Entry of Final Judgment, 1.) Pursuant to Local Rule 7-3, an Opposition to a Motion must be filed 21 days prior to the date of the hearing. In the instant case, Fairbanks' motion was set to be heard on April 26, 2005.¹⁰ Thus, any Opposition was due on April 5, 2005. Plaintiff, however, filed her Opposition on April 12, 2005, and did not seek leave to file such Opposition late. Accordingly, Plaintiff's Opposition is stricken.

2. Merits of Fairbanks' Motion

Nonetheless, the Court evaluates the merits of Fairbanks' Motion. Fairbanks asserts that entry of final judgment is appropriate because the Court's March 7, 2005 Order resolved all of Plaintiff's claims against Fairbanks. (Id.)

First, entry of final judgment is appropriate because this is an action with multiple parties, and the Court's March 7, 2005 Order resolved all claims against one of those parties, Fairbanks. See Fed. R. Civ. P. 54(b). Moreover, as discussed supra, Plaintiff has been denied leave to amend the Complaint as to

¹⁰On April 18, 2005, the Court continued the hearing to May 17, 2005 so that this motion could be adjudicated at the same time as Plaintiff's Motion for Leave to Amend.

1 claims against Fairbanks. Accordingly, all claims against Fairbanks have been resolved in its favor.

2 Second, there is no just reason for delaying entry of final judgment. In evaluating whether there is
3 no just reason for delay, the Court must consider both the preservation of judicial economy as well as the
4 equities involved. Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 8 (1980). In the instant case,
5 entry of final judgment will serve judicial economy by streamlining the litigation and focusing the litigation on
6 the remaining defendants. Alcan Aluminum Corp. v. Carlsberg Financial Corp., 689 F.2d 815, 817 (9th
7 Cir. 1982). Moreover, the balance of the equities also favors entry of final judgment because Fairbanks
8 will be required to unnecessarily wait for the adjudication of claims against the remaining defendants,
9 despite the fact that its defenses of res judicata and release bar Plaintiff's claims against Fairbanks.
10 Meanwhile, even if the Court were to consider Plaintiff's Opposition, it fails to identify any prejudice that
11 Plaintiff will suffer as a result of entry of final judgment. Accordingly, the Court finds that entry of final
12 judgment in favor of Fairbanks is appropriate in the instant action.

13 CONCLUSION

14 For the foregoing reasons, the Court STRIKES those portions of the FAC that add allegations
15 against Fairbanks and Cal Land, and DENIES Plaintiff's Motion for Leave to Amend. Plaintiff is ordered
16 to file a Second Amended Complaint that removes the stricken allegations within 15 days from the date of
17 this Order. The Court also GRANTS Fairbanks' Motion for Entry of Final Judgment.

18 The Case Management Conference is CONTINUED TO **July 27, 2005 at 3:30 p.m.**, and will
19 proceed **telephonically**. The parties shall **meet and confer** prior to the conference and shall prepare a
20 joint Case Management Conference Statement which shall be filed no later than ten (10) days prior to the
21 Case Management Conference. Plaintiff shall be responsible for filing the statement as well as for arranging
22 the conference call. All parties shall be on the line and shall call (510) 637-3559 at the above indicated
23 date and time.

24 IT IS SO ORDERED.

25 Dated: 5-26-05

/s/ Sandra Brown Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

EXHIBIT “F”

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED

JAN 19 2006

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

PATRICIA BARBERA,

No. C 04-3738 SBA

Plaintiff,

ORDER

v.

[Docket No. 111]

WMC MORTGAGE CORP., et al.,

Defendants.

This matter is before the Court on Defendants' WMC Mortgage Corp., WMC Finance Co., and WMC Direct (collectively "Defendants") motion to dismiss Plaintiff Patricia Barbera's ("Plaintiff") Second Amended Complaint ("SAC") for failure to state a claim upon which relief can be granted. Having read and considered the arguments presented by the parties in the papers submitted to the Court, the Court finds this matter appropriate for resolution without a hearing. The Court hereby GRANTS Defendants' motion to dismiss. Plaintiff's third, fourth and fifth claims are DISMISSED WITH PREJUDICE. The case is REMANDED to the Superior Court of the State of California in and for the County of San Francisco.

BACKGROUND

A. Factual Background¹

1. The Parties

Plaintiff is a 73-year old woman residing at all material times in the County of Marin, California.

¹ The following facts are taken from Plaintiff's SAC.

1 Defendant WMC Mortgage Corp. ("WMC") is an entity formed in part by Defendant Apollo
2 Management L.P. WMC is in the business of making subprime loans on residential property and
3 also acts as the administrator for those loans. Defendant WMCDirect, owned and operated by
4 WMC, is an online nationwide business services website for mortgage brokers. SAC ¶ 3. On June
5 14, 2004, Defendant GE Consumer Finance Co., the consumer lending unit of the General Electric
6 Company, purchased Defendant WMC Finance Co., including Defendants WMC and WMCDirect,
7 from affiliates of Apollo Management L.P. SAC ¶ 4.

8 2. Allegations

9 In June of 1997, Plaintiff was in a "desperate financial situation" and obtained a loan from
10 WMC for \$322,500. SAC ¶ 13. On June 12, 1997, Plaintiff executed the loan documents, at which
11 time "defendants failed to provide to Plaintiff two written notices of Plaintiff's right to rescind within
12 three days of closing, and defendants failed to prepare and deliver accurate disclosures that were
13 mandated" under the Truth in Lending Act, 15 U.S.C. section 1601 *et seq.* SAC ¶ 14.

14 On May 19, 1998, WMC notified Plaintiff that it had not received proof of her renewal of the
15 hazard insurance policy on Plaintiff's home. SAC ¶ 15. Despite numerous telephone calls from
16 Plaintiff to WMC, and verification provided to WMC by Plaintiff's insurance company that a copy of
17 Plaintiff's insurance policy had been mailed to WMC, WMC "force-place[d]" a substitute policy from
18 another hazard insurance company at Plaintiff's expense." *Id.* This new policy had a premium of
19 \$2,242, nearly three times the annual premium of Plaintiff's policy. *Id.*

20 In January of 1999, Plaintiff received a letter from WMC stating that WMC had received
21 confirmation of Plaintiff's hazard insurance coverage and that WMC had cancelled both the force-
22 placed insurance and its charge to Plaintiff for that policy. *Id.* ¶ 16. However, WMC in fact did not
23 cancel the \$2,242 charge to Plaintiff's account and continued to impose an annual charge on
24 Plaintiff's account for this hazard insurance. *Id.* ¶ 17.

25 On August 19, 1999, WMC served on Plaintiff a ten-day default notice, listing the amount
26 alleged due on Plaintiff's mortgage, but, according to Plaintiff, the listed amounts due were false. *Id.*
27 ¶ 18. On November 5, 1999, using these excessive amounts as a pretext, WMC and its foreclosure
28

1 agent, Millennium Foreclosure Services, LLC ("Millennium")², served Plaintiff with a notice of
 2 default in the amount of \$42,114.79. *Id.* On December 4, 1999, Plaintiff sent a detailed letter to
 3 WMC and Millennium, which constituted a "qualified written request" within the meaning of Real
 4 Estate Settlement Procedures Act ("RESPA") 12 U.S.C. section 2605(e), whereby she denied owing
 5 the amount shown in the default notice and renewed her previous oral requests to WMC for an
 6 accurate accounting. *Id.* ¶ 19. Plaintiff alleges WMC violated RESPA beginning in June of 1999
 7 through March 1, 2002 by failing to respond to Plaintiff's oral requests for an accounting, and failing
 8 to acknowledge or to respond within the statutory time limits to Plaintiff's "qualified written
 9 request."³ *Id.* ¶ 21. Furthermore, WMC continued to bill Plaintiff for improper charges and began to
 10 carry out a foreclosure sale of Plaintiff's home based upon these improper charges. *Id.*

11 On February 11, 2000, Plaintiff received from Millennium a Notice of Trustee's sale,
 12 recorded on February 7, 2000 citing a sale date of March 2, 2000 in the amount of \$372,316.39. *Id.* ¶
 13 23.

14 On February 27, 2000, Plaintiff sent via facsimile to WMC a copy of a telegram informing
 15 WMC that it had failed to respond to Plaintiff's previous letters, had failed to provide an accurate
 16 accounting, and had violated various laws and regulations. *Id.* ¶ 24. On March 1, 2000, WMC
 17 supplied Plaintiff with a statement of history of payments on the loan, but Plaintiff contends the
 18 statement was incomprehensible. *Id.* ¶ 25.

19 On March 2, 2000, Plaintiff notified WMC that she had filed a Chapter 13 bankruptcy
 20 petition and verified that the foreclosure had been cancelled. *Id.* ¶ 26. On April 11, 2000, Plaintiff
 21 asserts that, in violation of the automatic bankruptcy stay, WMC filed a Notice of Trustee's Sale
 22
 23
 24

25
 26 ² Millennium is not a party in this action.

27 ³ 12 U.S.C. section 2605(e) of RESPA states a loan servicer shall provide a written response
 28 acknowledging receipt of the "qualified written request" within 20 days, and shall respond to such a
 request within 60 days, excluding legal public holidays, Saturdays, and Sundays. *See* 12 U.S.C. §
 2605(e); SAC ¶ 20.

1 scheduled for May 10, 2000. *Id.*⁴

2 **B. Procedural History**

3 Plaintiff filed the initial complaint in this case on July 23, 2004 in San Francisco Superior
4 Court against WMC, WMC Finance Co., Apollo Management L.P., WMCDirect, GE Consumer
5 Finance, Fairbanks Capital Corp., Fairbanks Capital Holding Corp., and California Land Title
6 Company of Marin ("Cal Land"). On September 3, 2004, the action was removed to this Court. On
7 January 7, 2005, after several stipulated extensions of time to respond to the complaint, Cal Land
8 filed an Answer to the Complaint.

9 On January 10, 2005, then defendants Fairbanks Capital Corporation and Fairbanks Capital
10 Holding Corporation (collectively "Fairbanks") filed a motion for summary judgment, in which they
11 claimed Plaintiff's suit was barred under the principles of res judicata and release because Plaintiff
12 was a member of a nationwide class action, which challenged the same conduct, and which was
13 subsequently settled. Because Plaintiff did not dispute that she was a member of the prior class
14

15 ⁴ Plaintiff alleges additional facts raised for the first time in her opposition to Defendants'
16 motion. Specifically, Plaintiff alleges: (1) Defendants "postdated receipt of payments, to make it appear
17 that they were delinquent and late charges are applied in addition to other obtuse designations" (Pl. Opp.
18 filed Oct. 11, 2005, ¶ 5); (2) Defendants "misapplied the extra which I included with my payments" (*Id.*
19 ¶ 7); (3) Defendants "had [Plaintiff's] bankruptcy stay lifted by use of false figures" (*Id.* ¶ 8); (4) "on
20 adjustable interest rate notices, [Defendants] failed to include: index used, index rate, interest rate,
21 (current and projected), and margin applied" (*Id.* ¶ 10); (5) Defendants harassed Plaintiff with automatic
22 message telephone calls (*Id.* ¶ 11); (6) Defendants refused to provide Plaintiff with information
23 concerning the amount due under her loan (*Id.* ¶ 12); (7) on February 24, 2000, Plaintiff's attorney "faxed
24 a factual protest and 'let's talk' letter" to Defendants regarding the February 11, 2000 Notice of Trustee's
25 Sale, to which there was no response (*Id.* ¶ 19); (8) on March 2, 2000 Plaintiff was informed by her
26 attorney that her attorney had spoken with a representative of Defendants who stated "the total arrears
27 is \$68,811.61, which includes an advance for homeowners insurance in the amount of \$7,411.04 and
28 foreclosures fees of \$3,403.29" (*Id.* ¶ 21); (9) in May 2000 WMC "reported to the Credit Bureaus that
[Plaintiff] was delinquent in the amount of \$72,050" (*Id.* ¶ 26); (10) on December 15, 2000, Plaintiff
sent WMC "a one line notice of rescission taken verbatim from the unexecuted form which [she] had
received, 'I wish to cancel'" (*Id.* ¶ 29); (11) On January 5, 2001, Plaintiff received a letter dated January
2, 2001, from WMC Senior Vice President & General Counsel, Michael L. Mayer, which included an
executed Notice of Right to Cancel and informed Plaintiff that her cancellation notice was "invalid and
of no legal effect." (*Id.* ¶ 30).

None of the above facts are alleged in Plaintiff's SAC but are raised for the first time in her
opposition. "It is axiomatic that the complaint may not be amended by briefs in opposition to a motion
to dismiss." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984). That Plaintiff
is proceeding *in pro per* does not render the rules of the Court inapplicable. See *King v. Atiyeh*, 814 F.2d
565, 567 (9th Cir. 1987) (Pro per litigants must follow the same procedural rules as represented parties.)
Consequently, the Court shall limit its review to those facts properly alleged in the SAC, and not those
newly raised in Plaintiff's opposition.

1 action against Fairbanks, which involved identical claims and ended in a final judgment on the
2 merits, by Order dated March 7, 2005, the Court granted Fairbanks' motion for summary judgment,
3 finding that Plaintiff's claims against Fairbanks were barred by the doctrines of res judicata and
4 release [docket no. 71.]

5 On March 15, 2005, Plaintiff filed a First Amended Complaint ("FAC"). The FAC included
6 additional allegations against Defendant WMC, an additional cause of action for an accounting
7 against WMC and Fairbanks, named Cal Land in the third cause of action for violations of, *inter*
8 *alia*, the Truth in Lending Act, and added two additional causes of action against Cal Land for
9 breach of fiduciary duty and negligence. On March 21, 2005, Fairbanks filed a motion for entry of
10 final judgment pursuant to Federal Rule of Civil Procedure 54. On April 12, 2005, Plaintiff filed an
11 opposition to Fairbanks' motion, and also filed a motion for leave to amend the FAC. In her request
12 for leave to amend the FAC, Plaintiff sought to add new allegations against Fairbanks and the other
13 defendants. On May 26, 2005, the Court denied Plaintiff's Motion for Leave to Amend the FAC,
14 struck those portions of the FAC that added allegations against Fairbanks and Cal Land, and granted
15 Fairbanks' motion for entry of final judgment [docket no. 96.] Plaintiff was ordered to file a Second
16 Amended Complaint that removed the stricken allegations.

17 On June 1, 2005, Plaintiff substituted herself as counsel in place of her previously retained
18 counsel [docket no. 97.]

19 Plaintiff filed the SAC on August 10, 2005 [docket no. 108.] On August 25, 2005,
20 Defendants filed the instant motion to dismiss. Defendants also filed a Request for Judicial Notice.⁵
21

22 ⁵ In Defendants' Request for Judicial Notice, Defendants request that the Court take judicial
23 notice of exhibits: (A) Plaintiff's complaint on file in state court, *Barbera v. WMC Mortgage Corp.*,
24 San Francisco Superior Court Civil Action No. 322066, filed June 11, 2001; (B) this Court's Order dated
25 March 1, 2005, Granting Fairbanks' Motion for Summary Judgment; (C) this Court's Order dated May
26 26, 2005, Granting Fairbanks' Motion for Entry of Final Judgment; (D-E) Copies of Assembly Bill No.
27 292 (1970 Reg. Sess. (Jan. 21, 1970)) and Assembly Bill No. 292 (1970)) (as amended Aug. 7, 1970);
28 (F) Notice of Entry of Order Granting Defendant WMC's Motions *In Limine* Nos. 1, 2 & 4, Denying
WMC's Motion *In Limine* 3, and Denying Plaintiff's Motion for Leave to Amend, entered by Judge
Busch in Plaintiff's action in San Francisco Superior Court; (G) text of Proposition 2; and (H) California
Department of Real Estate website printout.

Federal Rule of Evidence 201 authorizes the court to judicially notice only those "adjudicative
facts" that are either "(1) generally known within the territorial jurisdiction of the trial court or (2)
capable of accurate and ready determination by sources whose accuracy cannot reasonably be

1 Plaintiff filed an opposition with this Court on October 11, 2005.⁶

2 LEGAL STANDARD

3 A. Rule 12(b)(6)

4 Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss may be granted
5 if it appears beyond a doubt that the plaintiff "can prove no set of facts in support of his
6 claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). For

7
8 questioned." Fed. R. Evid. 201(b). "Adjudicative facts are usually those facts that are in issue in a
9 particular case." *Korematsu v. United States*, 584 F. Supp. 1406, 1414 (N.D. Cal. 1984) (Patel, J.).

10 With regard to Exhibit A, Defendants do not make clear to this Court for what purpose they are
11 requesting this Court take judicial notice of Plaintiff's state court complaint. Defendants simply state
12 Plaintiff has filed, with and without counsel, several civil actions against WMC and the parties have
13 conducted considerable discovery since the first action was filed in June of 2001. Defs. Mot. 2:14-20.
14 The existence of Plaintiff's state court complaint does not concern any "facts in issue" in this case, nor
15 is it relevant to the instant motion to dismiss. Consequently, the request is DENIED as to Exhibit A.

16 As the March 1, 2005 and May 26, 2005 Orders are part of the Court's own docket in this matter,
17 a formal request for judicial notice is unnecessary.

18 Defendants cite to Exhibits D, E and F in support of their argument that Plaintiff's Consumer
19 Legal Remedies Act ("CLRA") claim must fail because credit transactions do not fall within CLRA's
20 purview. Defs. Mot 13:5-24. The CLRA is a California statute which was irrelevant to the Court's
21 analysis and disposition of Plaintiff's federal claims. Therefore, the request for judicial notice is
22 DENIED as to Exhibits D, E & F.

23 Finally, Defendant cites to Exhibits G & H in support of their argument that Plaintiff's claim of
24 usury must fail as California has exempted from the usury laws licensed real estate brokers by the State
25 of California, and, Defendants argue, WMC was a licensed real estate broker at the time the loan was
26 made. The usury cause of action is based on state law. Again, given the Court's focus upon Plaintiff's
27 federal claims, these exhibits are irrelevant. For these reasons, the request for judicial notice is DENIED
28 as to Exhibits G & H.

29 ⁶ Defendants contend Plaintiff served upon them a different version of her opposition brief than
30 the one she filed with this Court. Defendants attached the version of the opposition they received as
31 Exhibit A to the Declaration of Seta Arabian in Support of Defendants' Reply ("Arabian Decl.") In the
32 version filed with the Court on October 11, 2005, in the "Foreclosure-bankruptcy issues" section,
33 Plaintiff includes two new paragraphs that are not present in the copy faxed to the Defendants and
34 attached to the Arabian Decl. These new sections concern Plaintiff's research into WMC's past and
35 current litigation, and what Plaintiff believes to be the relevant California laws that have been violated
36 by the conduct of Defendants alleged in the SAC. Additionally, in the opposition filed with the Court
37 but not in the version faxed to Defendants, Plaintiff attached copies of: 1) an article entitled "Loans Cost
38 Minorities More" by David Olinger and Jeffrey A. Roberts, Denver Post Staff Writers, Feb. 27, 2001;
39 2) a transcript of the testimony of Professor Cathy Lesser Mansfield before the Committee on Banking
40 and Financial Services, United States House of Representatives, May 24, 2000, at the Rayburn House
41 Office Building; and 3) copies of statements received by Plaintiff from WMC and Select Portfolio
42 Servicing, Inc.

43 These additional paragraphs and material were the only differences between the briefs received
44 by Defendants and filed with the Court and were not germane to the Court's analysis of Defendants'
45 motion to dismiss as they did not address the substantive issues raised by Defendants' in their motion.
46 Consequently, for purposes of deciding this motion, the Court restricted its review to the opposition
47 served upon Defendants.

1 purposes of such a motion, the complaint is construed in a light most favorable to the
2 plaintiff and all properly pleaded factual allegations are taken as true. *Jenkins v. McKeithen*,
3 395 U.S. 411, 421 (1969); *Everest and Jennings, Inc. v. American Motorists Ins. Co.*, 23
4 F.3d 226, 228 (9th Cir. 1994). All reasonable inferences are to be drawn in favor of the
5 plaintiff. *Jacobson v. Hughes Aircraft*, 105 F.3d 1288, 1296 (9th Cir. 1997).

6 When a complaint is dismissed for failure to state a claim, "leave to amend should be
7 granted unless the court determines that the allegation of other facts consistent with the
8 challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v.*
9 *Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). The court should consider
10 factors such as "the presence or absence of undue delay, bad faith, dilatory motive, repeated
11 failure to cure deficiencies by previous amendments, undue prejudice to the opposing party
12 and futility of the proposed amendment." *Moore v. Kayport Package Express*, 885 F.2d
13 531, 538 (9th Cir. 1989). Of these factors, prejudice to the opposing party is the most
14 important. *See Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990) (citing
15 *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971)). Leave to
16 amend is properly denied "where the amendment would be futile." *DeSoto Yellow Freight*
17 *Sys.*, 957 F.2d 655, 658 (9th Cir. 1992).

18 ANALYSIS

19 The SAC asserts the following federal claims against WMC: (1) violation of the
20 Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.*; (2) violation of the Real Estate
21 Settlement Procedures Act, 12 U.S.C. §§ 2601, *et seq.*; and (3) violation of the Fair Debt
22 Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* ("FDCA").

23 A. Plaintiff's First Federal Claim - Violation of the Truth In Lending Act

24 1. The Statutes

25 In her third cause of action Plaintiff alleges violation of the Truth in Lending Act
26
27
28

1 ("TILA"), HOEPA, and Regulation Z.⁷ SAC, ¶¶ 41-43. 15 U.S.C. § 1635(a), the provision
2 of TILA upon which Plaintiff relies, states in full:

3 Disclosure of obligor's right to rescind. Except as otherwise provided in this
4 section, in the case of any consumer credit transaction (including opening or
5 increasing the credit limit for an open end credit plan) in which a security
6 interest, including any such interest arising by operation of law, is or will be
7 retained or acquired in any property which is used as the principal dwelling of
8 the person to whom credit is extended, *the obligor shall have the right to*
9 *rescind the transaction until midnight of the third business day following*
10 *the consummation of the transaction or the delivery of the information and*
11 *rescission forms required under this section together with a statement*
12 *containing the material disclosures required under this subchapter,* [15
13 U.S.C. §§ 1601 et seq.] whichever is later, by notifying the creditor, in
14 accordance with regulations of the Board, of his intention to do so. The
15 creditor shall clearly and conspicuously disclose, in accordance with
16 regulations of the Board, to any obligor in a transaction subject to this section
17 the rights of the obligor under this section. The creditor shall also provide, in
18 accordance with regulations of the Board, appropriate forms for the obligor to
19 exercise his right to rescind any transaction subject to this section.

20 15 U.S.C. § 1635(a) (emphasis added). 15 U.S.C. § 1639(a)(1), the provision of HOEPA
21 upon which Plaintiff relies, states in relevant part:

22 Specific disclosures. In addition to other disclosures required under this
23 subchapter [15 U.S.C. §§ 1601 et seq.], for each mortgage referred to in
24 section 1602(aa) of this title, the creditor shall provide . . . disclosures in
25 conspicuous type size . . .

26 15 U.S.C. § 1639(a)(1). Finally, Regulation Z requires a "business which offers or extends
27 credit" to make certain disclosures:

28 Purpose. The purpose of this regulation is to promote the informed use of
consumer credit by requiring disclosures about its terms and cost. The
regulation also gives consumers the right to cancel certain credit transactions
that involve a lien on a consumer's principal dwelling, regulates certain credit
card practices, and provides a means for fair and timely resolution of credit
billing disputes.

12 C.F.R. § 226.1(b) & (c).

2. Analysis

Plaintiff seeks both rescission of her loan and damages. 15 U.S.C. § 1640(e).

⁷ The acronym "HOEPA" stands for "Home Ownership and Equity Protection Act" of 1994. HOEPA, which took effect on October 1, 1995, provides special protections for consumers who obtain high-rate or high-fee loans secured by their principal dwellings by requiring creditors to provide certain material information at least three days before the loan is consummated, prohibiting the use of certain loan terms, and barring specified practices.

1 Plaintiff's right of rescission is governed by 15 U.S.C. § 1635(f). This section provides, in
2 relevant part:

3 An obligor's right of rescission shall expire three years after the date
4 of consummation of the transaction or upon the sale of the property,
5 whichever occurs first, notwithstanding the fact that the information
and forms required under this section or any other disclosures
required under this part have not been delivered to the obligor.

6 15 U.S.C. § 1635(f). Civil penalties under TILA and HOEPA are subject to a one-year
7 statute of limitations. Plaintiff's loan closed in June of 1997. Plaintiff filed suit in state
8 court on July 23, 2004, which was removed to this Court in September of 2004, over seven
9 years later. Consequently, both Plaintiff's claim for damages, as well as her right to rescind,
10 are time-barred by these sections.

11 Plaintiff's SAC conclusorily asserts "[a]ny statute of limitations applicable to these
12 violations has been tolled under the doctrine of what is called equitable tolling." SAC ¶ 42.⁸
13 Plaintiff's defense to the statute of limitations is unpersuasive. "The equitable tolling
14 doctrine has been applied by the Supreme Court in certain circumstances, [] but it has been
15 applied sparingly." *Scholar v. Pacific Bell*, 963 F.2d 264, 268 (9th Cir.1992) (citing *Irwin v.*
16 *Veterans Admin.*, 498 U.S. 89, 111 S.Ct. 453, 457-58, 112 L.Ed.2d 435 (1990)). "Courts
17 have been generally unforgiving, however, when a late filing is due to claimant's failure 'to
18 exercise due diligence in preserving his legal rights.' " *Id.* (citing *Irwin*, 111 S.Ct. at 458).
19 "Equitable tolling focuses primarily on the plaintiff's excusable ignorance of the limitations
20 period." *Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir. 1998).

21
22
23 ⁸ In her opposition she states 11 U.S.C. § 108 extends the statute of limitations for commencing
24 or continuing an action by the debtor. However, as Plaintiff concedes, that statute is available for
trustees suing to protect a bankruptcy estate. Plaintiff does not assert she is a trustee.

25 Additionally, Plaintiff argues that the force-placed insurance charge "could constitute a new
26 transaction which would require new disclosures and a new consummation date." Pl. Opp. Sec. IV ¶ 6.
27 Plaintiff does not indicate when that consummation date would have occurred, either the date of the
charge or the date Plaintiff discovered the charge on her account. Construing the facts in the most
28 favorable light to Plaintiff, the latest date for which she could allege the force-placed insurance charge
constituted a new transaction would be the date she learned of it, March 2, 2000. That was over four
years prior to the filing of the instant complaint in state court. Therefore, even if Plaintiff were able to
argue that imposition of the force-placed insurance charge constitutes a new transaction requiring new
disclosures and a new consummation date, she is nevertheless barred by the statute of limitations.

Here, Plaintiff's SAC fails to plead such facts. As a preliminary matter, the factual predicate for her claim that WMC failed to provide her with certain documents should have been known to her in 1997, well before July 2004. In her opposition, Plaintiff states that she signed the "Notice of Right to Cancel" on June 12, 1997 and acknowledged, by her signature, receipt of two copies of the this notice. Pl. Opp. ¶ 1. This acknowledgment is evidence that Plaintiff received two copies of this notice, or, at a minimum, was aware that she was entitled to two copies of this notice at the time of the loan closing. Plaintiff alleges that she was not given any documents on June 12, 1997, contrary to her signed acknowledgment, but concedes that when she did receive her copy of her loan documents on June 19, 1997, she "put it away without inspecting it," and years passed before she inspected what those documents contained. *Id.* Plaintiff's failure to inspect the documents, especially in light of her signed acknowledgment, does not constitute "excusable ignorance of the limitations period" justifying imposition of equitable tolling. Thus, this claim is barred by the statute of limitations and is DISMISSED with prejudice.

B. Plaintiff's Second Federal Claim - Violation of the Real Estate Settlement Procedures Act

In her fourth cause of action, Plaintiff alleges the following acts by WMC violated the Real Estate Settlement Procedures Act ("RESPA"): "kickbacks, referral fees, unnecessary escrow accounts for taxes and hazard insurance, improper or inaccurate reporting to credit bureaus, failure to disclose the transfer of the servicing of Plaintiff's loan account, failure to respond to acknowledge 'payments from a borrower' and to acknowledge 'making the payments of principal and interest as may be required pursuant to the terms of the loan,' and other home mortgage lending practices that tend to cause excessive borrowing costs for home loan borrowers." SAC ¶ 47. Plaintiff additionally alleges that WMC violated RESPA "[b]eginning June 1999, through March 1, 2002" by failing to respond to Plaintiff's oral requests and failing to acknowledge or respond to Plaintiff's qualified written requests." SAC ¶ 21. Defendants respond that this claim is time barred.

The applicable statutes of limitations for claims brought pursuant to RESPA are

1 found in 12 U.S.C. section 2614. "Any action pursuant to the provisions of section 2605,
 2 2607, or 2608 of this title may be brought in the United States district court within 3 years in
 3 the case of a violation of section 2605 of this title and 1 year in the case of a violation of
 4 section 2607 or 2608 of this title from the date of the occurrence of the violation." *See* 12
 5 U.S.C. §2614.

6 1. Section 2607

7 Plaintiff's allegations of kickbacks and referral fees are covered under section
 8 2607(a).⁹ By its terms, section 2607(a) prohibits the giving or receipt of fees or kickbacks
 9 "incident to or part of a real estate settlement service involving a federally related mortgage
 10 loan." *See* 12 U.S.C. § 2607(a). "Settlement services" is defined as any "service provided in
 11 connection with a real estate settlement." *See* 12 U.S.C. § 2602(3). No where in Plaintiff's
 12 SAC does she allege where, when, how or from whom WMC received kickbacks or referral
 13 fees. Rather it is a bald assertion unsupported by facts. The facts alleged by Plaintiff fail to
 14 demonstrate the inapplicability of the statute of limitations. Plaintiff received her mortgage
 15 loan in June of 1997. Section 2614 required her to bring her claim alleging kickbacks or
 16 referral fees within one year, by June of 1998. This claim is time barred and is therefore
 17 DISMISSED with prejudice.

18 2. Section 2605

19 The remaining RESPA allegations are subject to the 3-year statute of limitations as
 20 the conduct she alleges by WMC concerns "servicing of mortgage loans and administration
 21 of escrow accounts." *See* 12 U.S.C. § 2605.¹⁰

23 ⁹ This provision states: "No person shall give and no person shall accept any fee, kickback, or
 24 thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to
 25 or a part of a real estate settlement service involving a federally related mortgage loan shall be referred
 to any person." 12 U.S.C. § 2607(a).

26 ¹⁰ The other statute referenced in section 2614, section 2608, is inapplicable to this case. Section
 27 2608 states: "No seller of property that will be purchased with the assistance of a federally related
 28 mortgage loan shall require directly or indirectly, as a condition to selling the property, that title
 insurance covering the property be purchased by the buyer from any particular title company." Plaintiff's
 complaint does not involve the sale of her home or allegations that she was required to purchase title

Plaintiff's allegations are inconsistent and insufficient to overcome the time bar for several reasons. First, the latest date for which Plaintiff alleges violative conduct on the part of WMC is April 11, 2000, over four years prior to the filing the instant complaint. Thus, her claims are time-barred. Second, Plaintiff's loan was transferred to another entity for servicing in July of 2000; Plaintiff does not explain, in her SAC or opposition, how WMC violated RESPA through March 1, 2002, *after* the loan had been transferred. Third, RESPA imposes obligations upon a party upon written requests, not oral. *See* 12 U.S.C. § 2605(e)(1)(B). The only qualified written request¹¹ Plaintiff asserts in her SAC occurred on December 4, 1999, more than three years prior to the filing of the instant complaint. Fourth, even assuming Plaintiff's delayed discovery of the transfer of her loan in September, 2003 was reasonable such that the doctrine of equitable tolling applied, Plaintiff learned of the transfer ten months prior to the filing of this suit. *See Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000) ("[E]quitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs.") Plaintiff does not provide any justification for the delay between her discovery of the transfer, and the filing of the instant complaint. Therefore, she has not proven she is entitled to invoke the doctrine of equitable tolling.

For all these reasons, this claim is DISMISSED with prejudice.

C. Plaintiff's Third Federal Claim - Violation of the Fair Debt Collection Practices Act

In her fifth cause of action, Plaintiff alleges WMC's acts and conduct violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* SAC ¶ 51. Plaintiff generally alleges all of the acts and conduct by WMC violate the FDCPA, including insurance from a particular company.

¹¹ 12 U.S.C. 2605(e)(1)(B) states in relevant part: "For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower."

1 definition of debt collectors, "any officer or employee of a creditor while, *in the name of the*
 2 *creditor*, collecting debts for such creditor." 15 U.S.C. § 1692a(6)(A) (emphasis added).
 3 Because Plaintiff alleges activities by WMC regarding collection of payments owed to it
 4 under the loan, i.e., it was WMC's debt it sought to recover from Plaintiff, WMC was not a
 5 "debt collector" for purposes of the FDCPA. Thus, Plaintiff has no cognizable claim against
 6 WMC on this ground.

7 For these reasons, this claim is DISMISSED with prejudice.

8 **D. Supplemental State Causes of Action**

9 When a case is properly removed on the basis of federal question jurisdiction, but the
 10 federal claims are subsequently eliminated from the case, the district court retains the
 11 discretion to remand the action to state court. *See Carnegie-Mellon Univ. v. Cahill*, 484
 12 U.S. 343, 348 (9th Cir. 1991). In each case, and at every stage of the litigation, the federal
 13 court must consider and weigh the values of judicial economy, convenience, fairness, and
 14 comity in order to decide whether to exercise jurisdiction over a case involving pendent
 15 state-law claims. *Id.* at 349. When the balance of the relevant factors indicates that a case
 16 properly belongs in state court, such as when the federal claims have been resolved in the
 17 early stages of the litigation, the district court may decline the exercise of jurisdiction and
 18 remand the action to state court. *Id.* As the United States Supreme Court recognized in
 19 *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), the district court's jurisdiction
 20 over state law claims "need not be exercised in every case in which it is found to exist
 21 Needless decisions of state law should be avoided as a matter of comity[.]" *Id.*

22 Plaintiff's third, fourth and fifth claims are the only claims alleged over which the
 23 Court has original jurisdiction. Those claims have been dismissed with prejudice.
 24 Moreover, since this litigation is in its initial stage, the concerns of "economy, convenience,
 25 fairness and comity" weigh in favor of declining to retain jurisdiction. *See Imagineering,*
 26 *Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1309 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004
 27 (1993). Therefore, the Court exercises its discretion and declines to assert supplemental
 28 jurisdiction over the remaining state law claims.

1 "the improper or inaccurate reports to credit borrowers" by WMC.¹² *Id.* Here, again, WMC
2 responds that Plaintiff's claim is time-barred. Additionally, even if the claim were not time-
3 barred, WMC argues it is misplaced since the FDCPA only prohibits certain activities of
4 debt collectors, not creditors such as WMC.

5 1. Statute of Limitations

6 "An action to enforce any liability created by this subchapter may be brought in any
7 appropriate United States district court without regard to the amount in controversy, or in
8 any other court of competent jurisdiction, within one year from the date on which the
9 violation occurs." 15 U.S.C. § 1692k(d). As with her other allegations, Plaintiff merely
10 asserts that the violations giving rise to the claim "continue through the present time." SAC
11 ¶ 51. She does not offer any evidence of the nature of the acts of WMC which form the
12 basis of the assertion, nor when they occurred. Moreover, given WMC's transfer of the
13 servicing of Plaintiff's loan to another party in 2000, the Court is unaware of any facts
14 Plaintiff could allege that would fall within the year prior to her filing the instant complaint.

15 2. FDCPA Applies Only to "Debt Collectors"

16 Alternatively, WMC argues that even were this cause of action not time barred by the
17 statute of limitations, Plaintiff's claim still fails as the FDCPA is inapplicable to parties
18 collecting their own debt.

19 The FDCPA regulates debt collectors rather than creditors. *Thomas v. Law Firm of*
20 *Simpson & Cyback*, 392 F.3d 914, 916-17 (7th Cir. 2004). The term "debt collector" means
21 any person who "regularly collects or attempts to collect, directly or indirectly, debts owed
22 or due or asserted to be owed or due to *another*." 15 U.S.C. § 1692a(6) (emphasis added).
23 The term "creditor" means "any person who offers or extends credit creating a debt or to
24 whom a debt is owed" 15 U.S.C. 1692a(4). Furthermore, the FDCPA exempts from its
25

26 ¹² Plaintiff references 12 U.S.C. § 2605(3)(d) with respect to her allegation of "improper or
27 inaccurate reports to credit borrowers." SAC ¶ 51. There is no 12 U.S.C. § 2605(3)(d). In this same
28 paragraph of the SAC, Plaintiff asserts a "loan servicer may not provide information regarding any
overdue payment to any consumer reporting agency." *Id.* The SAC does not allege when, to whom, nor
what information WMC provided to any consumer reporting agency regarding any overdue payments.
Thus the SAC is completely devoid of facts to support these allegations.

CONCLUSION

For the reasons stated above,

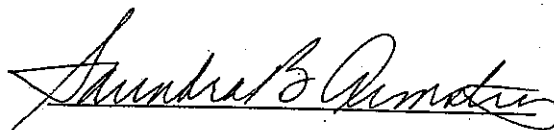
IT IS HEREBY ORDERED THAT Defendants' motion to dismiss is GRANTED.
Plaintiff's third, fourth and fifth claims are DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED THAT the case is REMANDED to the Superior Court
of the State of California in and for the County of San Francisco. The clerk is directed to
terminate any pending matters and to close the file.

IT IS SO ORDERED

IT IS SO ORDERED.

Dated: 1-19-06



SAUNDRA BROWN ARMSTRONG
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Barbera,

Plaintiff,

v.

WMC Mortgage Corp. et al,

Defendant.

Case Number: CV04-03738 SBA

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on January 19, 2006, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: January 19, 2006

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk